Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1995

JERSEY CARTING, INC., ANGELA MORIANO and MARIO MORIANO,

Petitioners,

vs.

BOARD OF REGULATORY COMMISSIONERS,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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123 pp

QUESTIONS PRESENTED FOR REVIEW

The State of New Jersey Board of Public Utilities commenced this action and revoked the Certificate of Public Convenience and Necessity of Petitioner, Jersey Carting, Inc. and permanently barred its principals, Petitioners Angela and Mario Moriano from the New Jersey Solid Waste Industry. Due to the fact that a related criminal action with identical issues was pending, Petitioners requested a stay of the civil matter, which was denied. At the hearings, Petitioners exercised their Fifth Amendment privileges and did not testify. State action compelled Petitioners to elect between two constitutionally protected rights, the privileges of the Fifth Amendment and the right to redress in the Courts under the Fourteenth Amendment. Petitioners challenge to the New Jersey waste flow control scheme in light of this Court's recent decision in *C & A Carbone Inc. v. Clarkstown,* 114 S. Ct. 1677 (1994) which held analogous waste flow regulations to be a violation of the Commerce Clause, was rejected.

The questions presented by this case are as follows:

1. Did the denial of the stay pending resolution of the related criminal proceeding constitute State action denying Petitioners substantive and procedural due process by forcing Petitioners to elect between their Fifth Amendment privileges and their right to effective redress in the Courts as protected by the Fourteenth Amendment to the Constitution of the United States?

2 Did the State of New Jersey deprive Petitioners of their property and livelihood by enforcing statutes and regulations which *per se* violate the dormant Commerce Clause of the Constitution of the United States?

LIST OF PARTIES

Petitioner, Jersey Carting, Inc. does not own or otherwise possess an interest in any parent company or any wholly owned subsidiary.

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Petitioners Jersey Carting, Inc., Angela Moriano and Mario Moriano ("Petitioners") respectfully pray that a writ of certiorari issue to review the Final Judgment of the Superior Court of New Jersey, Appellate Division. On November 14, 1995, the Supreme Court of New Jersey denied Petitioners' Petition for Certification.

OPINIONS BELOW

The denial of Petitioners' Petition for Certification by the Supreme Court of New Jersey (App. 1a), is not reported. The opinion of the Superior Court of New Jersey, Appellate Division,(App. 66a-87a), is not reported. The final decision of the Commissioner of the Department of Environmental Protection and Energy ("DEPE") (App. 54a-65a), is reported at 93 N.J. A.R. 2d (EPE) 56 (1992). The initial decision of the Office of Administrative Law (App. 2a-53a), is not reported.

STATEMENT OF JURISDICTION

The Petition to Review the Final Judgment of the Superior Court of New Jersey, Appellate Division, was denied by the Supreme Court of New Jersey on November 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law.

Article I, § 8, cl. 3 of the Constitution of the United States of America provides in pertinent part:

> Congress shall have the power . . . [t]o regulate Commerce . . . among the several states.

N.J. Admin. Code tit. 7 § 26-6.1 sets forth the statutory authority for the subchapter (App. 88a); N.J. Admin. Code tit. 7 § 26-6.2 sets forth the purpose of regulatory scheme (App. 88a); N.J. Admin. Code tit. 7 § 26-6.5 sets forth the district waste flow planning requirements and disposal facility designations for:

(b) [Bergen County District]

(g) [Essex County District]

(i) [Hackensack Meadowlands District]

(j) [Hudson County District]

(m) [Middlesex County District]

(o) [Morris County District]

(q) [Passaic County District]

(App. 89a-97a).

N.J. Admin. Code tit. 7 § 26-6.6 sets forth the procedure for modification of waste flows pursuant to an amendment to a District Solid Waste Management Plan (App. 98a); N.J. Admin. Code tit. 7 § 26-6.7 sets forth the procedure for emergency direction or redirection of solid waste flow (App. 98a-99a).

STATEMENT OF THE CASE

A. The Facts

Between March and June 1988, the State of New Jersey Board of Public Utilities ("Board")[1] issued two Orders to Show Cause against Petitioners Jersey Carting, Inc. ("Jersey Carting") and its principals, Angela Moriano and Mario Moriano ("Morianos") alleging violations of the Solid Waste Utility Control Act, N.J. Stat. Ann. § 48:13A-1, *et seq.*, various waste flow directives issued by the Board and the New Jersey Department of Environmental Protection ("NJDEP") and tariff violations. These matters were then designated contested matters and transferred for hearings to the Office of Administrative Law ("OAL"), where they were consolidated. The penalties of an adverse ruling by the OAL included the revocation of Petitioners' Certificate of Public Convenience and Necessity, and therefore, the taking of Petitioners' livelihood.

Subsequent to the issuance of the Orders to Show Cause, but prior to the OAL hearings which were held between September 24, 1990 to October 4, 1990, a State Grand Jury returned

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1. Pursuant to Reorganization Plan No. 002 (1991), which became effective on August 19, 1991, all responsibility and authority formerly vested in the Board for the economic regulation of solid waste utilities was transferred to the newly reorganized Department of Environmental Protection and Energy. Subsequently, both agencies were reorganized and all enforcement responsibility was vested with the New Jersey Department of Environmental Protection.

Indictments against Petitioner Jersey Carting charging theft by deception, a crime of the third degree. The charges carry maximum penalties of five years imprisonment and $7,500 fine. After the return of the Indictment, Petitioners Angela Moriano and Mario Moriano wished to exercise their Fifth Amendment privileges not to testify against themselves. They also knew that only from their own testimony at the OAL could they effectively defend the allegations brought by the State in its Orders to Show Cause. As the pending criminal and civil charges involved identical issues of fact, Petitioners requested a stay of the civil hearings pending the completion of the criminal proceedings. This request for a stay was summarily denied by the Administrative Law Judge ("ALJ"). Due to the pendency of the criminal matter, Petitioners, Angela Moriano and Mario Moriano, asserted their Fifth Amendment privileges and did not testify at the OAL hearings. Subsequent to the conclusion of the OAL hearings, the criminal charges were tried and a guilty verdict returned by a jury. After appellate review, this verdict was reversed and the underlying charges dismissed. Petitioners sought to reopen the OAL hearing to present testimony. This request was not granted.

B. The Decision of the Office of Administrative Law

The initial decision rendered by the ALJ concluded that Petitioners violated the emergency waste flow directives and certain tariff and interim rate relief orders. (App. 41a-45a). Monetary fines were imposed in the amount of $109,000. (App. 48a-49a). Additionally, the ALJ recommended the revocation of Jersey Carting's Certificate of Public Convenience and Necessity and the permanent debarment of Angela Moriano and Mario Moriano from the solid waste industry. (App. 49a).

C. The Decision of the Commissioner of the New Jersey Department of Environmental Protection

Following this initial decision, the Commissioner of the New Jersey Department of Environmental Protection ("Commissioner") issued a Summary Order which substantially adopted the ALJ decision. Included in the Commissioner's Order was a revocation of Jersey Carting's Certificate of Public Convenience and Public Necessity and permanent debarment of the principals of Petitioner Jersey Carting from the solid waste industry. In addition to the monetary penalty of $109,000, a $77,000 penalty was also imposed on Jersey Carting for its alleged violations of the provisions of its tariff setting forth waste generation site-specific disposal rates.

On December 14, 1992, a Notice of Appeal was filed by Petitioners with the Superior Court of New Jersey, Appellate Division, challenging the Commissioner's Order. Notwithstanding the fact that the Commissioner had objected to an issuance of a stay of the OAL proceedings pending the resolution of the criminal charges, the Commissioner voluntarily agreed to issue a stay of his final decision pending Petitioners' appeal. This stay remains in place as of the date of this filing, more than three years later.

On January 25, 1993, after the dismissal of the criminal indictment, Petitioners filed a request with the Commissioner to remand the proceeding to the OAL for consideration of Petitioners' testimony regarding (i) defenses to the underlying allegations and (ii) mitigation of the penalties and sanctions imposed. Petitioners' request for remand was not granted.

D. The Decision of the Appellate Division

Despite the fact State action compelled Petitioners to elect

between two constitutionally protected rights, when the single issuance of a stay would have protected both rights, the New Jersey Superior Court, Appellate Division, held "it was not fundamentally unfair to require appellants to participate in the administrative proceedings." (App. 75a). Moreover, despite the fact that the United States Supreme Court decision in *C & A Carbone Inc. v. Clarkstown,* 114 S. Ct. 1677 (1994), (which held analogous waste flow control ordinances to be a violation of the Commerce Clause of the United States Constitution), had not yet been rendered at the time of the OAL hearings, the New Jersey Superior Court, Appellate Division dismissed Petitioners' arguments challenging deprivation of their livelihood by reason of violation of the Commerce Clause, stating they had not been raised below. (App. 83a). The Appellate Division further determined that even if New Jersey's waste flow control regulations are found to be in violation of the Commerce Clause, Petitioners would still be subject to the various fines and penalties imposed, including the loss of their livelihood. (App 84a-87a).

E. The Decision of the Supreme Court of New Jersey

On or about November 4, 1994, Petitioners filed a Petition for Certification to review the Final Judgment of the Superior Court of New Jersey, Appellate Division. On November 14, 1995, the petition was denied. (App. 1a).

The Commissioner has continued to stay enforcement of the penalties pending the outcome of this appeal.

REASONS FOR GRANTING THE WRIT

Petitioners Jersey Carting, Angela Moriano and Mario Moriano seek to have this Court review the decision of the Superior Court of New Jersey, Appellate Division, affirming the

Administrative Law Judge's decision to deny a stay of the OAL hearing pending resolution of the related criminal proceedings, and refusing to consider Petitioners' claim that the subject waste flow control regulations are *per se* invalid as violative of the Commerce Clause.

Denial of the stay by the Administrative Law Judge, and the affirmation of the decision by the Superior Court of New Jersey, Appellate Division, violated Petitioners' substantive and procedural rights of due process, as protected by the Fourteenth Amendment to the Constitution of the United States, by forcing Petitioners to elect between their Fifth Amendment privileges and their right to effective redress in the Courts. Additionally, it was fundamentally unfair for the Appellate Division not to consider Petitioners arguments regarding the New Jersey waste flow control scheme being violative of the Commerce Clause of the Constitution of the United States of America in light of the clear applicability of the United States Supreme Court decision in *C & A Carbone v. Clarkstown,* 114 S. Ct. 1677 (1994). The Appellate Division was also incorrect in holding that even if the New Jersey waste flow control scheme was held to be *per se* invalid in light of *Carbone,* Petitioners' loss of property interest (including their loss of livelihood) would be not affected. In so holding the Court failed to consider that the most serious asserted violations (*i.e.* waste flow control violations) would be subject to dismissal.

Prior to the OAL hearing respecting alleged violations by Petitioners of the Solid Waste Utility Control Act N.J. Stat. Ann. 48:13A-1, *et seq.*, and certain various asserted tariff and waste flow control directives, Petitioner Jersey Carting was indicted by a State Grand Jury alleging Theft by Deception, a crime of the third degree. Arguing that participation by Petitioners in the administrative proceedings would be fundamentally unfair in light of the interrelated criminal proceedings, Petitioners sought

a stay in the OAL of the civil hearings until completion of the criminal matter. Despite the fact that the criminal and civil charges involved identical issues and events, Petitioners' request for a stay was summarily denied by the ALJ. (App. 4a). The Superior Court of New Jersey, Appellate Division, affirmed the decision of the ALJ, holding that "[s]ince the public interest in preventing illegal dumping was substantial and the scope of the criminal case limited in comparison to the civil proceeding, . . . it was not fundamentally unfair to require appellants to participate in the administrative proceedings." (App. 4a).

Petitioners disagree. The State of New Jersey, in two separate but related actions, sought potentially to deprive Petitioners of their liberty by way of a criminal action, and sought to deprive Petitioners of their property and livelihood by way of a civil action. In order to protect their liberty, Petitioners wished to exercise their privilege not to testify against themselves. In order to protect their property and livelihood, however, they wished to testify and present themselves as witnesses in the civil proceeding. The identical stay to which the State has consented throughout the appeal process would have protected both fundamental rights. Failure of the State to have granted the stay of the OAL hearings pending resolution of the criminal matter has deprived Petitioners of their most fundamental of civil rights, effective redress in the Courts.

During the Congressional debates of the Reconstruction Amendments, not all legislators were in agreement as to what rights would be protected by the Fourteenth Amendment (which had been introduced by Representative Bingham of Ohio). Agreement existed, however, as to a core of protected rights including the right to own property, the right to contract and the right to effective redress in the courts, with the ability to testify and call witnesses. *Cong. Globe*, 39th Congress, 1st Sess. 133-134 (1866). These three protected rights were fundamental to

life, liberty and happiness. The State of New Jersey, in two separate but related proceedings, was attempting to deprive Petitioners of fundamental rights when Petitioners sought relief by issuance of a stay. The State denied Petitioners these fundamental rights when the stay was objected to and denied.

The right of access to the courts is well established and clearly is "one of the fundamental rights protected by the Constitution." *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983). This court recognized the significance of this right to access in *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907) when it declared:

> The right to sue *and defend* in the courts is the alternative of force. In an organized society *it is the right conservative of all other rights*, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers, 207 U.S. at 148 (citations omitted) (emphasis added). The right to effective redress in the courts is grounded in several Constitutional sources, including the right to petition the government for redress pursuant to the First Amendment, the privileges and immunities provided by Article Four, and the due process clause of the Fourteenth Amendment. *Am. Civil Liberties Union v. Mabus*, 719 F. Supp. 1345, 1358 (S.D. Miss. 1989) (*quoting Ryland*, 708 F.2d at 967)).

What does effective redress in the Courts mean? Petitioners contend that it means more than the right to be a named party to an action. Rather, the right to access to the courts "mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the core of the parties' claims or defense and to present evidence on the

contested facts." *Complaint of Bankers Trust Co.*, 752 F.2d 874 (3rd Cir. 1984) (emphasis added). *See also, Wolff v. McDonnell*, 418 U.S. 539 (1974). Moreover, such access to the courts must be "adequate, effective and meaningful." *Ryland*, 708 F.2d at 972 (*quoting Bounds v. Smith*, 430 U.S. 817 (1977)). It is a guaranteed fundamental Constitutional right which is protected from state interference, absent a showing of a compelling state interest. *Ryland*, 708 F.2d at 972. It is also a right which ought not be denied by reason of the exercise of other fundamental rights.

An equally meaningful Constitutional right is provided by the Fifth Amendment to the Constitution which guarantees:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

For individuals seeking redress in the courts regarding protection of a property interest, this amendment provides critical protections against both self incrimination and unlawful State interference of one's due process rights. The State of New Jersey, in two separate actions, compelled Petitioners to elect between these two fundamental protections. Undoubtedly, given the significance of the interests protected by these Constitutional provisions, each must be regarded as being of equal importance.

Petitioners contend that in light of the interrelated civil and criminal matters brought against them by the State, it was fundamentally unfair to require them to participate in the administrative hearing until resolution of the criminal action. Moreover, Petitioners argue that the denial of the stay pending the resolution of the related criminal proceeding constitutes State action which denied Petitioners' substantive and procedural due process by forcing them to elect between two fundamental, yet equally important, Constitutional rights.

Although Petitioners recognize that the Constitution does not require a stay of all civil proceedings pending the outcome of criminal proceedings, a court may nevertheless within its discretion grant a stay in the interest of justice. *Sec. and Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 529 (1980). Failure properly to exercise this discretion is at the core of Petitioners' claim. Petitioners claim that when both a civil action and criminal action is brought by the State, special consideration should be exercised. Thus, it is recognized that:

> [o]ther than where there is specific evidence of agency bad faith or malicious governmental tactics, *the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.* The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self incrimination, expand right of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosection in advance of criminal trial, or otherwise prejudice the case.

Dresser, 628 F.2d at 1376 (emphasis added).

In *State v. Korbin Sec., Inc.*, 111 N.J. 307 (1988), the Supreme Court of New Jersey recognized that "[t]here may be cases where the requirement that a criminal defendant participate in a civil action, at peril of being denied some portion

of his worldly goods, violate[s] concepts of elementary fairness in view of the defendant's position in an inter-related criminal prosection." *Korbin*, 111 N.J. at 314 (citations omitted).

In deciding Petitioners' claims, the Superior Court of New Jersey, Appellate Division, analyzed the following *Korbin* factors which it determined to be sufficient to consider when determining whether to grant a stay pending the resolution of concurrent civil and criminal proceedings:

> (1) whether in the civil proceeding the government seeks *only* monetary penalty against the defendant;
>
> (2) whether the two actions are nearly identical in scope;
>
> (3) whether relief sought in the civil proceeding is intended to prevent continued injury to the public.

Korbin, 111 N.J. at 313-315.

Although the Superior Court of New Jersey, Appellate Division, examined the *Korbin* factors set forth above, its analysis was incorrect and a stay of the civil proceeding should have been granted pending the resolution of the criminal matter. In addition, the *Korbin* analysis does not adequately safeguard Petitioners' federally protected rights and is contrary to a broader, more judicious approach announced by the Second Circuit in *Dresser*. *Korbin* simply does not promote the protections guaranteed by the United States Constitution. Petitioners contended throughout this litigation that their rights to protect and defend their property interests outweighed the public interest. Conversely, the State argued that a greater public

interest required denial of the stay. The Superior Court of New Jersey, Appellate Division, held that the public interest in the proper disposal of solid waste was more substantial than Petitioners' liberty and property. (App. 75a).

However, despite the State's assertion of the existence of a greater public interest, it is apparent that such an interest did not exist. Following Petitioners' loss of their property interests through the debarment and revocation of their licenses, the State then voluntarily agreed to a stay of execution of the judgment against Petitioners until the completion of the appellate process. Thus, although the State previously argued that the greater public interest required that Petitioners no longer participate in the solid waste industry, it is apparent that once Petitioners' flawed and constitutionally defective hearing process that resulted in the elimination of Petitioners' property interests came to its predictable conclusion, this alleged crucial State interest dissipated, and Petitioners were allowed to continue to participate in the industry. Under any standard, this is State action which is disingenuous, wrong and the procedure deprived Petitioners of their most fundamental of rights.

A simple action by the State, that is, the issuance of the stay, would have provided Petitioners the constitutional protections to which they were entitled. Failure by the State to do so deprived them of property without due process.

The Superior Court of New Jersey, Appellate Division, also failed properly to consider Petitioners' claims that in light of this Court's decision in *Carbone*, 114 S. Ct. 1677, the New Jersey waste flow control scheme is *per se* invalid under the Commerce Clause of the Constitution of the United States of America. Following *Carbone*, the United States District Court for the District of New Jersey in *Atlantic Coast Demolition & Recycling, Inc., et al. vs. Bd. of Chosen Freeholders of Atlantic*

County, et al., 48 F.3d 701 (3rd Cir. 1995), *remanded*, 893 F. Supp. 301 (D.C. N.J. 1995) (additional injunction granted, CIV. A. 93-2669, 1995 WL 739072 (D.C. N.J. November 28, 1995)), issued injunctive relief against enforcement of elements of New Jersey's waste flow control regulations upon a determination of the likelihood of success on the merits by the plaintiffs in that case which challenged the regulations as being violative of the Commerce Clause of the Constitution of the United States. Issuance of this injunction in the presently ongoing proceeding on remand followed the determination of the United States Court of Appeals for the Third Circuit that the New Jersey waste flow control scheme, in effect and design, discriminated against interstate commerce.

Based on the foregoing, and in light of the severe penalties imposed upon Petitioners, (including, most significantly, deprivation of their right to pursue their livelihood) due to their alleged violations of these constitutionally infirm regulations, the Appellate Division erred in failing to consider Petitioners' claims in a post-*Carbone* environment.

In *Carbone*, this Court held that a similar waste flow control ordinance was discriminatory against interstate commerce, as it excluded both out-of-state and in-state competitors from local markets, and "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone*, 114 S. Ct. at 1683. Due to this discrimination against interstate commerce, this Court determined the flow control measure in *Carbone* to be *per se* invalid unless it is established by "the clearest showing" that there were "no other means to advance a legitimate local interest." *Id.* Under this strict level of scrutiny, the *Carbone* waste flow control ordinance could not stand. Furthermore, this Court declared that environmental and public health interests regarding the proper handling of solid waste were inadequate to sustain the regulations, as there were clearly

"any number of nondiscriminatory alternatives for addressing [such] health and environmental problems [,]. . . ." The use of the restriction of solid waste flow as a "finance measure" was also rejected as a constitutionally permissible justification to maintain a solid waste facility.

In light of *Carbone*, the Appellate Division erred in failing to consider Petitioners challenges to the New Jersey waste flow control scheme as being violative of the Commerce Clause. As the New Jersey waste flow control scheme requires that all waste originating within the State be processed at in-state designated facilities prior to leaving the State, it is clear such regulations "deprives out-of-state businesses of access to a local market." *Carbone*, 114 S. Ct. at 1681. Moreover, as the violation of these waste flow control regulations are the primary basis for the penalties assessed against Petitioners, including the loss of their livelihood, it was fundamentally unfair for the Appellate Division not to consider Petitioners claims.

The Appellate Division also erred in declaring that even if the New Jersey waste flow scheme is found to be *per se* invalid, the penalties imposed on Petitioners, including their loss of livelihood, remain enforceable despite the fact these harsh and extreme sanctions emanate from these unconstitutional regulations. It is clear that should the New Jersey waste flow control regulations be held unconstitutional, the penalties imposed upon Petitioners should not be enforced. At the very least the Court should have recognized that any remaining violations would incur less severe penalties, if any. Thus, the Superior Court of New Jersey, Appellate Division, erred by failing to consider Petitioners constitutional challenges to the New Jersey waste flow control scheme, and thus deprived Petitioners of their property and livelihood through the enforcement of statutes and regulations which *per se* violate the dormant Commerce Clause of the Constitution of the United States.

The Petition for the Writ of Certiorari should be granted for the following reasons:

1. The denial of the stay of a civil action by the Administrative Law Judge pending the completion of related criminal proceedings and the affirmation of the decision by the Superior Court of New Jersey, Appellate Division, violated Petitioners' substantive and procedural rights of due process, as prohibited by the Fourteenth Amendment to the Constitution of the United States, by forcing Petitioners to elect between their Fifth Amendment privileges and their right to effective redress in the Courts.

2. The Superior Court of New Jersey, Appellate Division, erred by failing to consider Petitioners' constitutional challenges to the New Jersey waste flow control scheme, and thus deprived Petitioners of their property and livelihood through the enforcement of statutes and regulations which *per se* violate the dormant Commerce Clause of the Constitution of the United States.

CONCLUSION

This case squarely presents the question of whether State action in denying the stay of the civil action pending the resolution of an interrelated criminal matter, was a denial of Petitioners' substantive and procedural due process by forcing Petitioners to elect between two equally important constitutional rights: their Fifth Amendment privileges and their right to effective redress in the Courts, as protected by the Fourteenth Amendment to the Constitution of the United States. Furthermore, this case clearly presents the question of whether the State of New Jersey deprived Petitioners of their property and livelihood by enforcing statutes and regulations which *per se* violate the dormant Commerce Clause of the Constitution of the United States.

Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED NOVEMBER 15, 1995

SUPREME COURT OF NEW JERSEY
C-357 September Term 1995
39,251

BOARD OF REGULATORY COMM.,

Petitioner-Respondent,

v.

JERSEY CARTING, INC., et al.,

Respondents-Petitioners.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1803-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 14th day of November, 1995.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX B — INITIAL DECISION OF THE STATE OF NEW JERSEY, OFFICE OF ADMINISTRATIVE LAW DATED JANUARY 7, 1992

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. ESW 4898-88 and
ESW 3363-88 (CONSOLIDATED)
AGENCY DKT. NOS. SS88030449
and SS88050695

BOARD OF REGULATORY COMMISSIONERS,

Petitioner,

v.

JERSEY CARTING, INC., ANGELA MORIANO, AND MARIO MORIANO,

Respondents.

Kevin Auerbacher, Deputy Attorney General, and D'Andre Workman, Deputy Attorney General, for the Staff of the Board of Regulatory Commissioners (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Eric A. Somerville, Esq., for respondent
(Somerville, Radding & Campbell, attorneys)

Record Closed: June 27, 1991 Decided: January 7, 1992

Appendix B

BEFORE DIANA C. SUKOVICH, ALJ:

PROCEDURAL HISTORY

On March 24, 1988, the Board of Public Utilities[1] issued an Order to Show Cause directed to Jersey Carting, Inc. (Jersey Carting or respondent), Angela Moriano (A. Moriano or respondent), and Mario Moriano (M. Moriano or respondent). Petitioner transmitted the matter to the Office of Administrative Law (OAL) on June 29, 1988 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* The Board subsequently issued an Order of Investigation and Order to Show Cause directed to respondents on June 15, 1988. Petitioner transmitted the latter order to the OAL on May 6, 1988, with a request that the two cases be consolidated. This request was granted.

Numerous conferences were held throughout the proceedings. A prehearing conference was held on July 13, 1988, and a prehearing order issued on July 28, 1988. Hearings were not scheduled at that time because a substantial amount of discovery remained uncompleted. Hearings were subsequently scheduled to commence on December 13, 1988.

Motions to compel discovery were filed by respondent and

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1. By Executive Order No. 38 dated August 14, 1981, the Board of Public Utilities, redesignated as the Board of Regulatory Commissioners, and the Department of Environmental Protection were, in effect, transferred to the newly created Department of Environmental Protection and Energy (DEPE). All references to the "Board" hereinafter are made, without distinction, to the Board of Public Utilities or the Board of Regulatory Commissioners as appropriate. Similarly, no distinctions are made hereinafter between the DEP and the DEPE.

the Board's Staff (Staff) on October 1, 1988 and October 31, 1988, respectively. Orders Denying and Granting the Motions in Part were issued on December 5, 1988. The hearings previously scheduled for December 1988 were adjourned because discovery had not been completed. A conference was conducted on December 13, 1988, on which date additional discovery deadlines were established.

A conference was subsequently conducted on January 20, 1989, at which time hearings were scheduled for March 1989. These hearing dates were adjourned because of illness of respondents' counsel. Hearings were rescheduled for July 1989, which hearings were adjourned on the basis of representations by the parties that a settlement had been reached. Communications were conducted among the parties and the judge, but an executed stipulation was not filed. Counsel for respondents was substituted in October 1989. Communications between counsel for the Staff and new counsel for respondents were conducted, and respondents determined not to execute a stipulation ostensibly reflecting the previously agreed upon settlement. Ultimately, in March 1990, the Staff advised counsel for respondents that it was revoking its consent to a stipulation which had been forwarded to prior counsel for respondents on July 24,1989.

Hearings were thereafter scheduled to commence on September 24, 1990. On September 18, 1990, respondents filed a motion to dismiss the current matter or, alternatively, to stay it until pending criminal charges were resolved. I denied this motion in its entirety on September 24, 1990. Hearings were held on September 24, 25, 26 and 27 and October 1, 2 and 4,1990.

At the close of hearings, a schedule for the filing of initial

and reply briefs was established, incorporating requirements for the filing of detailed proposed findings of fact. Counsel for respondents was substituted a second time on November 16, 1990. The briefing schedule was extended because of the substitution of counsel, a delay in receipt of hearing transcripts, and a delay in service of respondents' initial brief on counsel for the Staff.

Both the Staff and respondents filed initial briefs. In a reply brief, the Staff moved to strike certain portions of respondents' initial brief. Respondents subsequently filed a reply brief incorporating a response to this motion. An order granting the Staff's motion was issued on April 10,1991.

This judge subsequently requested that the Staff clarify and amplify certain areas addressed in its briefs. The Staff did so by a supplemental brief filed on June 24,1991. One area addressed an initial Staff position that recommended monetary penalties be stayed pending the disposition of *State of New Jersey v. Jersey Carting, Inc.* (Law Div., Bergen County, Docket No. 40-05-00089-S). In this respect, it is noted that the referenced criminal proceeding involved an indictment, charging Jersey Carting of theft by deception and, more specifically, alleging that Jersey Carting obtained monies exceeding $500 from United Parcel Services (UPS) and Haywood Pools Company (Haywood Pools), creating and reinforcing the false impression that, solid waste removed from premises operated by those entities by Jersey Carting was transported to and dumped at county transfer stations authorized by the Department of Environmental Protection (DEP) to accept such waste when Jersey Carting knew that such waste was transported to and dumped at HUB Recycling, Inc. (HUB) in the City of Newark. The Staff filed a letter on June 27, 1991 advising that the Superior Court action

resulted in a finding of guilt of the offense of theft by deception as charged and forwarding a copy of the opinion of the presiding judge. On October 31, 1991, the Staff filed a motion to reopen the record to take judicial notice of the judgment of conviction for theft by deception against Jersey Carting. This motion was denied. The deadline for the issuance of an initial decision was ultimately extended until January 10, 1992.

NATURE OF THE CASE

As noted hereinabove, this matter concerns two orders issued by the Board. These Orders are directed to Jersey Carting in its status as a solid waste collector holding a Certificate of Public Convenience and Necessity (Certificate) and to A. Moriano and M. Moriano, individually and as officers, directors, and shareholders of Jersey Carting.

The March 24, 1988 Order to Show Cause alleges generally that on certain specified dates, Jersey Carting violated waste-flow orders issued jointly by the DEP and the Board and that Jersey Carting was not using the Morris County Transfer Station (MCTS) to which it had been directed. Specifically, petitioner alleges that:

1. On December 30, 1987, Jersey Carting picked up a 40-yard container of solid waste at Haywood Pools in Elizabeth, New Jersey (Union County) and disposed of such waste at the Solid Waste Transfer and Recycling Company (SWTR) facility in Newark, New Jersey (Essex County), not the Edgeboro Landfill (Edgeboro), to which the waste was directed.

2. On February 24, 1988, Jersey Carting picked up a roll-off container of solid waste at Haywood Pools and disposed of such waste at Hub in Newark, not at the Automated Modular Systems, Inc. (AMS) Transfer Station in Linden, New Jersey (Union County).

3. In January 1988, Jersey Carting picked up a total of 28 containers of solid waste from Haywood Pools and did not dispose of such waste at the AMS Transfer Station, to which it was directed.

4. Jersey Carting was not utilizing the MCTS facilities, to which Morris County-generated waste was directed, and was instead mixing Morris County waste collected by Jersey Carting with solid waste collected by it in Essex County and disposing of such waste at the "Site F" Transfer Station[2] and/or HUB, both located in Newark *In the Matter of Allegations of Law and Administrative Code by Jersey Carting, Inc. and Angela Moriano and Mario Moriano, individually and as officers, directors and shareholder of Jersey Carting, Inc. respondent* (Docket No. SS88030449), Order to Show Cause, dated March 24, 1988, p. 2.

In the June 15, 1988 Order of Investigation and Order to Show Cause, the Board alleges that Jersey Carting violated joint DEP/Board waste-flow orders on certain dates, that Jersey

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2. As the parties recognize, the SWTR facility is also referred to as the Avenue F Transfer Station.

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Carting was granted various rate relief based upon inaccurate data as a consequence of such violations, and that Jersey Carting had not submitted bills to certain customers in the required format. More specifically, the Board alleges that:

1. On December 23, 1987, Jersey Carting disposed of waste originating in Springfield, New Jersey (Union County), at the Bergen County Utilities Authority (BCUA) Kingsland Landfill (Kingsland).

2. On March 2, 1988, Jersey Carting collected waste at Steak & Ale, located in Clark, New Jersey, the Holiday Inn, located in Springfield, New Jersey, Federal Pacific Electric Company (Federal Pacific), located in Hillside, New Jersey, and Testrite Opticians (Testrite) and Palmer Video (Palmer), located in Hillside, all in Union County, and disposed of such waste at the SWTR facility and that the DEP waste origin/waste disposal (O&D) forms submitted to SWTR regarding such waste stated that 100 percent of it originated in Fairfield, New Jersey (Essex County).[3]

3. Jersey Carting did not dispose of any waste at the Union County Transfer Stations prior to March 24, 1988.

4. On January 19, 1988, the Board issued an Order

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3. Solid waste permittees are required to maintain a daily record of waste received, including waste type and place of origin. *N.J.A.C.* 7:26-2.1(a). The specified information is required to be maintained and recorded by the facility operator and is supplied by the transporter to the facility on an O&D form, *Id* § (c).

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Approving Interim Rates reflecting a solid waste collection rate increase for Jersey Carting to recover increased disposal costs because of the redirection of Morris and Union County waste from Edgeboro to the MCTSs and the Union County Transfer Stations, respectively, and that the underlying petition incorporated false and misleading data because Jersey Carting failed to utilize the disposal sites upon which the requested rate adjustment was based. The Order to Show Cause and Order of Investigation also alleges in this respect that Jersey Carting's failure to utilize the disposal sites upon which its rate adjustments were based represent noncompliance with, and disregard of, Board orders in the following proceedings:

a. *In re Labor Contract Increases* (Docket No. SR87070550), Interim Order dated July 14, 1987;

b. *In re Union County Transfer Stations* (Docket Nos. SE87070709 and SE87070588), Order dated Aug. 6,1987;

c. *In re Union County Utilities Authority* (*Docket Nos.* SE87111308, et al), Preliminary Order dated December 31, 1987;

d. *In re Morris County Transfer Stations* (Docket Nos SE8711170 and SE87121391), Preliminary Order dated December 31, 1987; and

e. *In re Expedited Petitions* (Docket No. SR87121430 et al), Order Adopting Interim Rates dated January 19, 1988.

5. Jersey Carting failed to include on customer billings to UPS, Haywood Industrial Products (Haywood Industrial) and Haywood Pools the type and frequency of service, tariff rate applied, and number and size of containers, where applicable, in violation of *N.J.A.C.* 14:3-7 *et seq.* and certain specified Board orders.

Both orders directed respondents to show cause why certain penalties should not be imposed, including revocation of Jersey Carting's Certificate and prohibition of A. Moriano and M. Moriano from owning, operating, managing or controlling or having any interest in any solid waste business or organization within the State and from serving in certain capacities with such entities and owning any outstanding capital stock of, or maintaining, directly or indirectly, any financial interest of any nature in any solid waste business, corporation or association doing business in the State. In addition, the Orders directed respondents to show cause why the Board should not dismiss then pending petitions for expedited rate relief for Jersey Carting and why Jersey Carting's referenced authorized interim rate relief should not be declared null and void and refunded with interest.

The Staff argues that A. Moriano and M. Moriano should be barred from managing or owning any solid waste business organization within the State and from serving in certain positions and capacities regarding any solid waste business,

including, but not limited to, businesses engaged in the collection and disposal of solid waste. The Staff also argues that Jersey Carting's Certificate should be revoked and that monetary penalties should be imposed upon respondents.

Respondents do not really dispute that violations occurred, but argue that there are extenuating and mitigating circumstances regarding each violation. Respondents do not respond to the Staff's argued position on penalties, including calculation of specific monetary penalties. Respondents' argument on the imposition of penalties can be summarized as follows: "In view of the fact that the Boards (sic) Staff has requested a death sentence, i.e., license revocation, it would seem that you should be able to consider any matter tending to argue for a lesser penalty." (Respondents' reply letter brief, p. 2).

FINDINGS OF FACT

Eight witnesses testified on behalf of the Staff. Board investigators Edward Kozak (Kozak), Scott Shrader (Shrader), and Edward Castellano (Castellano) testified regarding their investigations pertaining to Jersey Carting. In support of the allegations contained in the Board's orders, the Staff also presented the testimony of Frank Capone, a principal of AMS, Tina McCabe, Staff Accountant at the MCTSs, Jeffrey Callahan, Deputy Director of the Union County Utilities Authority (UCUA), and, by subpoena, A. Moriano and M. Moriano. A. Moriano and M. Moriano, exercising their Fifth Amendment rights, essentially did not testify. The Staff also moved into evidence numerous documents. Respondents did not present any witnesses, but did proffer some documentary evidence.

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In general, I am persuaded by the evidence proffered on behalf of the Staff in all respects except regarding specific tariff violations. The Staff's evidence in this respect focussed upon alleged tariff violations concerning specific billings to Haywood Pools and UPS, as well as several quarterly billings to Morris and Union County customers generally. The evidence in this respect was ambiguous and did not meet, in my judgment, the burden of proof placed upon petitioner.

I am persuaded, based on a review of the entire record, that the material facts are not in dispute. In addition, as requested by the Staff, I have made negative inferences against respondents based on the Morianos' failures to testify. Based upon a review of the record, including the briefs and proposed findings of fact filed by the parties, I FIND the following to be FACTS:

1. A Certificate, Certificate SW330, was issued to Jersey Carting in 1986, granting Jersey Carting the authority to engage in the solid waste collection business. More specifically, by Order dated August 12, 1986, the Board approved the merger of Mario's Portable Service, Inc. (Mario's) into Jersey Carting and the transfer of Mario's Certificate to Jersey Carting. During the period 1987 through at least March 1988, Jersey Carting did not have authority from the Board or the DEP to operate a solid waste transfer or materials recovery facility.[4]

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4. A "Materials recovery facility" is ". . . solid waste facility such as a transfer station which is designed, operated and permitted to process a non-hazardous, solid waste stream by utilizing manual and/or mechanical methods to separate from the incoming waste stream, categories of useful materials which are then returned to the economic main stream in the form of raw

(Cont'd)

2. From 1987 until at least November 29, 1988, A. Moriano and M. Moriano were the President and Vice-President, respectively, of Jersey Carting, and A. Moriano was Jersey Carting's sole director. The outstanding stock of Jersey Carting was owned in equal shares by A. Moriano and M. Moriano. The Morianos were both actively involved in Jersey Carting's operations during the relevant periods of the Orders to Show Cause in question in this proceeding. A. Moriano's responsibilities included dictation of all correspondence for all corporate officers, checking of all invoices to insure correctness, efforts expended to establish new business, and involvement in negotiations with new customers and settling problems with old ones. M. Moriano became involved in all customer complaints not satisfactorily addressed by the managers of Jersey Carting, reviewed all bills with corporate personnel, and reviewed all monthly dump bills. A. Moriano and M. Moriano also met, together with the accounting staff of Jersey Carting, to review Jersey Carting's books and had daily meetings with dispatchers.

3. Pursuant to waste identification categories adopted by the DEP, solid waste Type 10 is

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materials or products for reuse." *N.J.A.C.* 7:26-1.4. A "Transfer Station" is defined in applicable regulations as ". . . a facility at which solid waste is transferred from one solid waste vehicle to another solid waste vehicle for transportation to a solid waste facility." *Ibid.*

deemed to be municipal waste consisting of household waste from private residences, commercial waste originating in wholesale, retail or service establishments, and institutional waste material originating in schools, hospitals, research institutions and public buildings. Solid waste Type 13 is bulky waste, which is defined as large items of waste material, for example, appliances, furniture, trees, branches, and tree trunks and stumps. Included in Type 13 waste are waste building materials and discarded automobiles, trucks and trailer and large vehicle parts and tires. Type 25 solid waste is animal and food processing wastes, which is processing waste materials generated in canneries, slaughterhouses, packing plants or similar industries, as well as dead animals. Type 27 waste is dry industrial waste, which is defined as waste materials resulting from manufacturing, industrial research, development processes, operations which are not hazardous, as well as non-hazardous oil spill clean-up waste, dry non-hazardous pesticides, dry non-hazardous chemical waste, and asbestos and asbestos-containing waste managed in accordance with federal regulations. *N.J.A.C.* 7:26-2.13(g).

4. On June 12, 1987, the Board and the DEP issued an order, effective immediately, which directed waste generated in Union County to Edgeboro. The order stated in pertinent part:

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> Edgeboro shall accept Waste Types 10 (except newspapers, aluminum cans, cardboard, corrugated, high-grade office paper and glass), 13, 25 and 27 generated in the affected municipalities in Middlesex, Morris, Somerset and Union Counties, and further detailed in Exhibit A, until transfer stations become available to those counties, or until DEP identifies other alternative waste disposal arrangements or until January 1, 1988, whichever first occurs. ((Ex. P-12(i), p. 2)).

The affected Union County municipalities included Elizabeth. *Id.* Ex. A, p. 1. The content of this order is as stated in Exhibit P-12(i).

5. A "pull ticket" is a term commonly used in the solid waste industry as referencing a document or receipt that the driver of a collection vehicle leaves with a customer after picking up a container. (Tr. 9/24/90, p. 56).

6. A pull ticket dated December 30, 1987 states that a Jersey Carting collection driver picked up a 40-yard closed roll-off container containing commercial refuse at the premises of Haywood Pools on that date. The identification number stated on the applicable pull ticket is 83561. An SWTR dump receipt dated December 30, 1987 states that at 9:30 a.m. on that date, Jersey Carting deposited a 40-cubic yard container of Type 13

waste at SWTR's transfer station in Newark, New Jersey (Essex County).

7. Jersey Carting billed Haywood Pools a total of $1,705.05 for waste removal services on December 30, 1987 pertaining to pull number ticket No. 83561.

8. Haywood Pools is located in Elizabeth, New Jersey, in Union County.

9. On December 30, 1987, a Jersey Carting collection vehicle picked up a 40-yard closed roll-off container containing Type 13 waste at the premises of Haywood Pools in Elizabeth, New Jersey, and disposed of such waste at approximately 9:30 a.m. on December 30, 1987 at the SWTR Transfer Station in Newark, New Jersey.

10. By order dated December 27, 1987, the Board granted an exclusive solid waste franchise to the UCUA, the implementing agency for the Union County Solid Waste Management Plan.

11. The DEP and the Board issued a joint Emergency Redirection of Solid Waste Flow Order on December 29, 1987. The content of this order is as stated in Exhibit P-12(iv).

    Pursuant to this order, all solid waste Type 10 generated within Hillside was directed to the

Ellesor Transfer Station in Elizabeth (Union County). All solid waste Types 10, 13, 23, 25 and 27 generated within Clark and Springfield in Union County was directed to the AMS Transfer Station, DEP Facility No. 20091, in Linden, Union County, for final disposal at a permitted, out-of-State solid waste disposal facility. All solid waste Types 13 and 23 generated within Hillside, not directed to the Ellesor Transfer Station, as also directed to the AMS facility in Linden. All solid waste Types 25 and 27 generated within Hillside was so directed. Finally, the Order provided that all solid waste Types 10, 13, 23, 25 and 27 generated in every municipality in Union County was directed as detailed in the Order until the proposed Union County resource recovery facility became operational, at which time all such solid waste would be directed to that facility.

The emergency waste-flow order was effective January 2, 1988 and was to remain in effect until approval by the Commissioner of the DEP of amendments to the Union County District Solid Waste Management Plan, which would adopt those or other waste-flows, and subsequent amendment of relative portions of the New Jersey Administrative Code. This Order contained the notice to solid waste collectors/haulers and facility operators detailed hereinafter as contained in other waste-flow directives. (See Findings of Fact No 15 hereinafter.)

12. During the morning of February 24, 1988, a

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Jersey Carting roll-off vehicle driven by Robert J. Pasquali (Pasquali) picked up a roll-off container containing non-source separated solid waste and/or Type 13 solid waste from Haywood Pools' premises in Elizabeth and deposited such waste in the afternoon on February 24, 1988 at HUB in Newark. When Pasquali was exiting HUB, he was informed by Kozak that he (Pasquali) was violating waste-flow directives and that the load should have gone to AMS. Pasquali generally responded that ". . . we are bringing our stuff here." (Tr. 9/24/90, p. 101).

13. The AMS Transfer Station became operational January 2, 1988. Jersey Carting did not open an account with the AMS Transfer Station until February 22, 1988 and did not tip any solid waste at the facility between January 2, 1988 and March 25, 1988.

14. During January 1988, Jersey Carting picked up 28 loads (containers of commercial solid waste) which was not source separated from Haywood Pools in Elizabeth. These 28 loads were not taken by Jersey Carting to the AMS Transfer Station.

15. The Board and the DEP issued an Emergency Redirection of Solid Waste Flow Order on December 29, 1987, redirecting solid waste Types 10, 13, 23, 25 and 27 generated in Morris County, with the exception of Mt. Arlington Borough, from Edgeboro to one of two transfer stations located in the Township of Mt. Olive and the

Township of Parsippany-Troy Hills, effective January 2, 1988. Waste Types 10, 13 and 23 generated within Mt. Arlington Borough were continued to be directed to the Mt. Arlington Landfill. The content of this Order is as stated in Exhibit P-12(ii).

The Order noticed all solid waste collectors/haulers and facility operators licensed by the Board and/or registered by the DEP and operating within Morris County of required operations and compliance with the Order and all other approved provisions of the Statewide and District Management Plan. The Order also stated that any collector/hauler failing to comply with the provisions of the Order would be deemed in violation of *N.J.S.A.* 13:1E-1 *et seq.* and *N.J.A.C.* 7:26-1 *et seq.* and subject to the provisions and penalties of all applicable laws and regulations.

16. By Order dated December 31, 1987, the Board approved an exclusive solid waste franchise, as well as a Certificate, for the Morris County Transfer Station, Inc. for the transfer stations located in Mt. Olive and Parsippany-Troy Hills for Morris County-generated solid waste. The content of this order is as stated in Exhibit P-10(iv).

17. The MCTSs, located in Parsippany-Troy Hills and Mount Olive, commenced operations on January 2,1988.

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18. Jersey Carting billed 57 customers with service locations in Morris County for collection services provided between January and March 1988. Thirty-five of the pertinent invoices issued by Jersey Carting for solid waste collection services provided to customers located in Morris County for the period January through March 1988 contain notations indicating billing for service, closure, recovery, host community, and importation taxes. The content of these bills is as stated in Exhibit P-14(b). It is reasonable to infer that the billings reflected in Exhibit P-14(b) were for solid waste collection services.

19. Jersey Carting opened an account with the MCTSs on March 18, 1988 and dumped its first load of solid waste at the facilities on March 22, 1988.

20. Jersey Carting provided solid waste collection services to the customers reflected on the bills in Exhibit P-14(b) for services rendered from January through March 1988 and did not deposit the waste collected at the MCTSs.

21. A rear-loading solid waste container is one that is picked up by a "leech type garbage truck" and dumped in the packer or back of the truck. (Tr. 9/26/90, p. 17).

22. As of January 19, 1988, Jersey Carting was providing solid waste collection service to two rear-loading containers located at the premises of

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Paramedical Supply Company (Paramedical) in Pinebrook, a part of Montville, New Jersey, in Morris County. Service was provided in January 1988 and continued as of February 8, 1988. The waste contained in the rear-end containers on February 8, 1988 was a mixture of different waste types, including styrofoam, plastic tubing, glass and plastic bottles, pharmaceutical bottles, wood waste and scraps, and plastic bags containing lunch and food scraps. The lunch and food scraps constituted what is referred to as "putrescible waste." *Id.* p. 18.[5] They were not "source separated." *Id.* p. 19.[6] The containers located at Paramedical's premises on February 8, 1990 were not taken to the MCTSs.

23. From January 1988 until at least February 9, 1988, Jersey Carting serviced a 30-yard roll-off container for "garbage only" at UPS' site in Parsippany, New Jersey. *Id.* p. 47 & Ex. P-2(a), p. 5. UPS separated all recyclables and sold them to recyclers without Jersey Carting's assistance. UPS had its own cardboard bailer, gave away used pallets, and sold scrap metals. In effect, UPS separated their own recyclables, bailed their

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5. "Putrescible waste" is defined in the applicable regulations as ". . . any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling and completely oxidized products."

6. Source separation is ". . . the process of separating recyclable materials from the solid waste stream at the point of waste generation." *Ibid.*

cardboard, and separated their own metals and some glasses. The waste collected by Jersey Carting generally consisted of mixed, office-type and lunch-type waste, the latter consisting of food scraps, food bags, paper cups, etc, some of which would be putrescible waste. The waste collected by Jersey Carting was not source separated and was not taken to the MCTSs.

24. On January 19, 1988, Shrader visited Jersey Carting's offices in East Rutherford, New Jersey, and spoke with an individual who identified himself as "Bill." Bill indicated that he was a dispatcher and informed Shrader that Jersey Carting was dumping Morris County waste at HUB. ((Ex. P-2(a), p. 1, & Tr., 9/26/90, p. 25)). Later that day, Shrader spoke by telephone with M. Moriano, who informed Shrader that Jersey Carting had not dumped at the MCTSs as of that date because it did not pick up enough waste for a full truckload in Morris County and it would be too costly to send a man out with a truck for only those stops. M. Moriano also indicated that rear-loading containers of customers in Morris, approximately 20, were being mixed with Essex waste and dumped at the SWTR facility. He further informed Shrader that Jersey Carting had only two roll-off customers in Morris County, UPS and AT&T in Parsippany, that those loads were being dumped at HUB, and that they contained no 'wet' garbage. Shrader informed M. Moriano that Morris County waste had to go to the MCTSs because they had a franchise for all Morris County garbage, and Moriano indicated

that he was aware of the franchise. M. Moriano also indicated that he would begin taking some of the Morris County waste to the transfer station. ((Ex. P-2(a), p. 3, & Tr. 9/26/90, pp. 26-28)).

25. On or about July 24, 1987, the Board and the DEP issued an Emergency Redirection of Solid Waste Flow Order pertaining to Union County — generated solid waste. The content of this order is as stated in Exhibit P-12(iii).

Pursuant to this redirection order, solid waste Types 10, 13, 23 and 27 generated in Springfield, Union County, were redirected from HMDC landfills to an AMS transfer station, which facility is also known as the Madaluna Disposal Transfer Station (Madaluna), in Linden, New Jersey, (Union County), reflecting the fact that a facility known as the Madaluna Transfer Station was located at the site during 1987 at which time a portion of Union County-generated waste was deposited at the facility. Springfield-generated waste was directed to the Madaluna Transfer Station effective August 1, 1987, until the commencement of operations at the AMS Transfer Station. Some Union County waste was also directed at that time to the Ellesor Transfer Station, Madaluna was located in Linden. As of January 2, 1987, the Madaluna operation essentially merged with the AMS Transfer Station.

The July 24, 1987 redirection order noted that an

emergency existed because of the cessation of solid waste disposal privileges for Union County municipalities at HMDC landfills subsequent to July 31, 1987 and that the redirection reflected therein was intended as an interim measure for the period from August 1, 1987 until December 31, 1987, in light of the anticipated operation of the Union County Transfer Station program effective January 1, 1988.

26. At approximately 10:00 a.m. on December 23, 1987, a Jersey Carting collection truck exited the parking lot of the former Boston Sea Party Restaurant (Boston Sea Party), located on the easterly side of Route 22 in Springfield, New Jersey, and proceeded to the SWTR Transfer Station in Newark. At approximately 1:00 p.m. the same day, a Jersey Carting tractor picked up a 30-yard roll-off container at the same site, which container was loaded with demolition waste, Type 13 waste, and dumped said waste at the Kingsland Landfill in Lyndhurst, New Jersey, Bergen County. This Type 13 waste emanated in Springfield, New Jersey. The O&D form submitted for this waste by the driver of the Jersey Carting vehicle, Rinaldo Garcia (Garcia), to the BCUA, the operator of Kingsland, stated that 100 percent of the load emanated in Carlstadt, New Jersey (Bergen County). After being dumped, the waste in question was mixed, almost immediately, with putrescable waste dumped by other vehicles, ground up and buried, along with all the other waste that was being disposed of at the time, by a bulldozer operating at the landfill. The load was dumped in the general area of the

landfill where trucks were dumping garbage. Garcia told Kozac on the day in question that the load could go to Kingland because it was used for road service in the dump.

27. In general, landfills attempt to fill roads leading to landfills with certain types of material to cover dirt in order to prevent mud from accumulating when it rains. Vehicles which bring fill which is being used to cover waste on any given day generally proceed to separate areas, away from the dumping site. O&D forms are generally not used when waste is taken to a landfill for such purposes.

28. A rear-packer truck is a "typical garbage type truck." Waste is thrown into the "hopper" of the vehicle, where it is compressed by a blade located in the rear of the vehicle. (Tr. 9/25/90, p. 166).

29. Costellano conducted a waste-flow investigation on March 2, 1988. On that date, at approximately 9:43 a.m., he observed a Jersey Carting rear-packer truck fill a rear-loading container behind the Steak & Ale, which is located at 1139 Raritan Road in Clark, New Jersey, and empty the contents of the container into the truck. The waste collected at Steak & Ale was restaurant waste.

The truck then proceeded to Route 22 in Springfield to a Holiday Inn, where the driver, Clement Rivers (Rivers), picked up two additional containers.

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After emptying these two containers, the truck proceeded to a building ostensibly occupied by Federal Pacific, located at 475 Mundet Place in Hillside, at which site the driver emptied cardboard drums and some loose debris, including pieces of wood, into the rear of the vehicle.

Federal Pacific occupied the building in question prior to March 2, 1988, but had vacated it as of that time. As of the date in question, Federal Pacific's name remained on the building so that it would not appear to be empty. An entity by the name of Viho Trucking (Viho) occupied part of the building. Jersey Carting provided solid collection service to Viho on March 2, 1989, which waste was taken to Solid Waste, Transfer's facility. Viho was a solid waste collection customer of Jersey Carting.

Subsequent to leaving the Federal Pacific site, the Jersey Carting truck proceeded to the rear of a small shopping mall located in Hillside in proximity to Testrite and Palmer, at which site the driver emptied a container into the truck. An entity known as Liberty Service was under contract by the property owner of the mall, Everest Realty, to clean the parking lot. The container in question was used by Liberty Service; Jersey Carting billed Liberty Service for collection services. It is reasonable to infer that Palmer's container contained floor sweepings.

The truck then traveled east on Route 22 to Route

21 north, where it entered the SWTR facility in Newark at approximately 11:07 a.m. and deposited the waste collected on that date. Castellano spoke to Rivers after the Jersey Carting truck exited the transfer station. In response to questions, Rivers informed Castellano that the entire load had been picked up in Fairfield, New Jersey. The certified O&D forms submitted by Rivers to the SWTR Transfer Station stated that 100 percent of the waste in question emanated in Fairfield, New Jersey, which is located in Essex County, and that the waste deposited was solid waste Type 13, bulky waste.

30. Although Jersey Carting was registered with the UCUA authority as of March 2, 1988, it had not dumped any waste there as of that date.

31. During the period January through March 1988, Jersey Carting provided solid waste collection services to at least eight customers located in Elizabeth, Union, Springfield, Hillside, and Clark, New Jersey, all of which are located in Union County. These customers are as stated in Exhibit P-14(a). Ten of the invoices issued by Jersey Carting to the customers located in Union County between January and March 1988 contain notations of billings pertaining to service, closure, recovery, host community, and importation taxes. All of the pertinent invoices are as stated in Exhibit P-14(a).

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32. Every hauler using the AMS Transfer Station must maintain a minimum balance. Those collectors utilizing only packer trucks must maintain a balance of $1,500; a minimum balance of $750 is required for haulers which generally deposit roll-off trucks. The minimum balance applicable to Jersey Carting is $1,500. Jersey Carting made a deposit payment to the AMS facility prior to March 24,1988 in the amount of $5,000.

33. Jersey Carting did not dispose of any waste at the AMS Transfer Station until March 25, 1988, at which time it deposited Type 10 waste. The load delivered on that date totaled 68 tons and was generated from two municipalities.

34. A solid waste services tax is levied upon the owner or operator of every sanitary landfill facility located in New Jersey, with an exception pertaining to the acceptance for disposal of waste products resulting from the operation of a resource recovery facility. *N.J.S.A.* 13:1E-138(a)(B). A resource recovery investment tax is also levied upon the owner or operator of every sanitary landfill facility pertaining to all solid waste accepted for disposal at such facility, with an exception pertaining to the acceptance for disposal of waste products resulting from the operation of a resource recovery facility. *Id.* § (b). A solid waste importation tax is levied upon every sanitary landfill facility which accepts solid waste emanating from outside of the Solid Waste

Management District in which the landfill is located, with an exception pertaining to resource recovery facilities. *Id.* §(7). A recycling tax is levied upon every solid waste facility pertaining to solid waste accepted for disposal or transfer at the facility. This tax is not imposed upon resource recovery facilities pertaining to the acceptance of solid waste disposal at the facility or upon solid waste transfer facilities designed and operated solely for receiving and transferring solid waste from collection vehicles to haulage vehicles for the purposes of facilitating the transportation of solid waste, upon the acceptance of solid waste for transfer to an in-state solid waste facility for permanent disposal. *Id.* §95(a). Host community benefits are available to any municipality within which a solid waste facility, including a transfer station, landfill or resource recovery facility, is located. *N.J.S.A.* 13:1E-28, 13:1E-28.1 & 48:13A-5.1.

For purposes of these provisions, 'solid waste' is generally defined as garbage, refuge, and other discarded materials resulting from industrial, commercial and agriculture operations and from domestic and community activities, as well as all other waste materials, including liquids; 'solid waste collection,' the activity related to pick-up and transportation of solid waste from its source or location to a transfer station or other authorized solid waste facility; 'solid waste facility,' the plant, structures and other real and personal property pertaining generally to facilities

operated pursuant to *N.J.S.A.* 13:1E-1 and 48:13A-1 *et seq.* or any other statute, including transfer stations, resource recovery facilities, sanitary landfill facilities, and other plants for the disposal of solid waste; 'resource recovery,' the collection, separation, recycling and recovery of metals, glass, paper and other materials for reuse, or the incineration of solid waste for energy production and the recovery of metals and other materials for reuse; 'sanitary landfill facility,' a solid waste facility at which solid waste is deposited on or in the land as fill for permanent disposal or storage for a period exceeding six months, not including hazardous waste; and 'transfer station,' a solid waste facility at which solid waste is transferred from a solid waste collection vehicle to a licensed solid waste haulage vehicle for transportation to an off-site sanitary landfill facility, resource recovery facility or other designation for disposal, excluding transfer stations at which solid waste is received for on-site transfer. *N.J.S.A.* 13:1E-3. (Supp. 1991-1992). *See, also, N.J.S.A.* 48:13A-3.

35. It is reasonable to infer that A. Moriano and M. Moriano instructed Jersey Carting waste collection vehicles to by-pass the Morris County and Union County designated transfer stations and that the Morianos determined to by-pass these transfer stations during the periods in question.

36. By orders dated December 31, 1987, the Board

authorized, expedited rate proceedings for collectors affected by waste-flow redirections in Morris and Union Counties. The proceedings allowed solid waste collectors to promptly recover increased disposal costs resulting from the redirection of Morris and Union County waste-flows from Edgeboro to solid waste transfer stations in each respective county. The expedited rate procedures provided that if interim expedited rate relief were granted and a collector were found not to have utilized the disposal site upon which the rate adjustment was based, any authorized interim rate relief would become immediately null and void and would be refunded with interest and other consequences.

37. On approximately January 11, 1988, Jersey Carting filed a petition with the Board requesting an expedited rate increase for solid waste collection services based upon Board approval of closure of Edgeboro to Union County waste on December 31, 1987 and the redirection of such waste, commencing January 1, 1988, to the Union County Transfer Stations. The content of this petition is as stated in Exhibit P-34(a). The petition asserted that the referenced redirection of waste would impact significantly upon Jersey Carting's operating costs and that such redirection might place Jersey Carting in the position of not being able to comply with various waste-flow orders of the DEP. Jersey Carting requested an interim increase to reflect increased costs of dumping effective January 1, 1988.

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38. On approximately January 11, 1988, Jersey Carting filed a petition with the Board seeking a rate increase for solid waste collection services based upon approval by the Board of closure of Edgeboro to Morris County waste on December 31, 1987 and redirection of such waste to the MCTSs commencing January 1, 1988. The content of this petition is as stated in Exhibit P-34(b). This petition alleged that the referenced redirection would impact significantly upon the operating costs of Jersey Carting and might place Jersey Carting in the position of not being able to comply with various waste-flow orders of the DEP. Jersey Carting requested that its rates be increased in an amount equal to its total increase in costs as a result of such redirection and that the Board approve an interim increase to reflect the increased costs of dumping effective January 1,1988.

39. As part of Jersey Carting's expedited rate filings, M. Moriano submitted signed certifications pertaining to each perspective petition in which he acknowledged that the expedited procedures constituted an experiment designed to respond to collector complaints concerning higher disposal charges and agreed, more specifically that:

> Therefore, in consideration of my authorization by the BPU to expeditiously impose upon my customers an increase which reflects an appropriate amount of increased

> disposal expenses as computed through these procedures, rather than proceeding through the regular rate case process, I agree on behalf of my company to all the conditions set forth in these new procedures (incorporated herein by reference) adopted for use in my case, including, but not limited to, the provisions calling for the automatic refund with interest, of rates found to be too high ... and *all* provisions regarding the consequences of my company's charging rates incorrectly, or my company's noncompliance with any time requirement or disposal site requirements provided for in the procedures, regardless of costs. ((Ex. P-35(m), p. 1 & Ex. P-35(v), p. 1)).

40. At an agenda meeting held on November 14, 1988, the Board approved Jersey Carting's request for expedited rate relief pertaining to the redirection of Union and Morris County waste. The Board subsequently issued an Order Adopting Interim Rates on January 19, 1988. The content of this Order is as stated in Exhibit P-10(v).

41. On July 14, 1987, the Board issued an Interim Order, in Docket No. SR87070550, in which it granted interim rates and established an expedited rate case procedure to allow solid waste collectors located in northern and central New Jersey to increase rates to reflect a labor contract

agreement between Teamsters Local 945 and solid waste utility collectors. The content of this order is as stated in Exhibit P-10 (i).

42. The Board issued an Order on August 6, 1987, in Docket Nos. SE870709 and SE87070588, in which it authorized expedited rate procedures, similar to those used for the labor contract for collectors, for collectors affected by the establishment of rates for the Union County transfer stations located in Linden and Elizabeth, New Jersey, the content of this order is as stated in Exhibit P-10 (ii).

43. On January 19, 1988, the Board issued an Order Adopting Interim Rates in Docket Nos. SR87121430 et al, approving interim expedited rate relief pursuant to the above-referenced procedures to allow solid waste collectors to recover costs effectuated by increased disposal costs at the Passaic County Transfer Station, the Cumberland County Landfill, the Morris County Transfer Stations, the Somerset County Transfer Stations, and the Union County Transfer Stations (Dkt. Nos. SE87111308, SE87121457 and SO87121407). The Board approved in this order rate increases for Jersey Carting pertaining to the Union County Transfer Stations (Dkt. No. SR88010179) and the Morris County Transfer Stations (Dkt. No. SR88010171). The content of this order is as stated in Exhibit P-10 (v) .

44. Jersey Carting's tariff, which was initially issued

June 15, 1981, and was effective November 29, 1982, applicable during the time periods relevant to this proceeding is as stated in Exhibit P-30. The tariff generally authorizes respondent to provide solid waste collection services at specified rate levels.

45. On September 14, 1984, the Board issued a Decision and Order in BPU Dkt. No. 8311-1032 approving a stipulation executed in that proceeding, which proceeding involved alleged tariff violations committed by Jersey Carting. The content of this Decision and Order is as stated in Exhibit P-1. The Board directed Jersey Carting to charge and provide service to its customers according to the terms of its filed tariff and ordered respondent to bill all customers as required by *N.J.A.C.* 14:3-7 *et seq.*, including the provision of the following information on all bills: (1) type of service (residential, commercial, industrial), (2) frequency of service, (3) rate applied, (4) number and size of containers, where applicable, (5) total quantity of waste collected during the billing period, (6) a separate line item showing the surcharge applied pursuant to the Recycling Act, *N.J.S.A.* 13:1E-92 *et seq.*, and the Sanitary Landfill Facility Closure and Contingency Fund Act, *N.J.S.A.* 13:1E-100 *et seq.*, and (7) a separate line item showing any applicable surcharge pursuant to Chapter 438, Laws of 1981 to fund county health department enforcement activities.

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46. On August 29, 1986, the Board issued an Order Adopting an Initial Decision, in which it approved a stipulation, in a proceeding concerning an application by the HMDC for an adjustment of District solid waste disposal rates, in BPU Dkt. No. SR8504-372 and SE8601-93. The content of this order is as stated in Exhibit P-11(i). The Board ordered the HMDC and all specified collectors to bill customers as required by *N.J.A.C.* 14:3-7 *et seq.* and to include the following information on billings: (1) type and frequency of service, (2) tariff rate applied, (3) number and size of containers, where applicable, (4) total quantity of waste collected, (5) a separate line item showing the surcharge applied as required by the Recycling Act, *N.J.S.A.* 13:1E-92 *et seq.* and the Sanitation Landfill Facility Closure and Contingency Fund Act, *N.J.S.A.* 13:1E-100 *et seq.*, (6) a separate line item showing any applicable surcharge pursuant to *N.J.S.A.* 13:1E-9 and 9.1 to fund county health department enforcement activities and (7) separate line items showing the solid waste service, resource recovery investment, and if applicable, solid waste importation taxes, *N.J.S.A.* 13:1E-136 *et seq.* Jersey Carting was one of the collectors specified (case number 845-361).

47. On December 24, 1986, the Board issued an Order Adopting Interim Rates in Dkt. No. SR86111288, approving on an interim basis an increase in rates for Jersey Carting to recover increased disposal

costs arising from an increase in rates approved for the HMDC. The content of this Order is as stated in Exhibit P-11(ii). The Board ordered Jersey Carting to bill all customers as required by *N.J.A.C* 14:3-7 *et seq*. and to include the seven categories of specified information on billings as detailed in Finding of Fact No. 46 hereinabove.

48. On September 9, 1987, the Board issued an Order Adopting Interim Rates in BPU Dkt. No. SR8707064 *et al.*, approving interim rate relief to certain specified solid waste collectors, including Jersey Carting. The Board ordered all solid waste collection utilities listed in the order to bill all customers as required by *N.J.A.C.* 14:3-7 *et seq*. and, to additionally include on all billings the information as specified in Finding of Fact No. 46 hereinabove. Interim rate increases were approved for Jersey Carting in relation to labor contract increases (BPU Dkt. SR87070662), rates effectuated at the Essex County Transfer Station (BPU Dkt. No. SR87080929), and rates effectuated at Edgeboro (BPU Dkt. No SR87080930).

49. On January 4, 1988, the Board issued an Order Adopting Interim Rates, in BPU Dkt. No. SR87111276 *et al.*, approving interim increases in rates for certain specified solid waste collection utilities, including Jersey Carting. All solid waste collection utilities listed in the order were directed to bill all customers as required by *N.J.A.C.* 14:3-7 *et seq*. and to additionally include

on all billings the information as specified in Finding of Fact No. 46 hereinabove. Interim rate increases were approved for Jersey Carting pursuant to rates effectuated for the Passaic County Transfer Stations (BPU Dkt. No. SR87121385).

50. On January 19,1988, the Board issued an Order Adopting Interim Rates, in Dkt. No. SR87121430 *et al.*, approving interim increased rates for solid waste collection utilities, including Jersey Carting. The Board ordered all solid waste collection utilities specified in the order to bill all customers as required by *N.J.A.C.* 14:3-7 *et seq.* and to additionally include on all billings the information specified in Finding of Fact No. 46 hereinabove. The Board approved interim rate increases for Jersey Carting reflective of rates approved for the Union County Transfer Stations (Dkt. No. SR8801010179) and the Morris County Transfer Station (Dkt. No. SR88010171). The content of this order is as stated in Exhibit P-10(v).

51. Jersey Carting issued 12 invoices for solid waste removal services in January 1988 to eight customers located in Union County. The content of these invoices is as stated in Exhibit P-14(a). These invoices were for services rendered and to be rendered in January, February and March 1988. Each invoice contains total billing for waste removal services. None of the invoices contains a breakdown of billings for service,

closure, recovery, host community and importation taxes, although several, on their face, appear to contain billings for host community taxes.

52. Jersey Carting issued 59 invoices in January 1988 for waste removal, services to 55 customers located in Morris County. The content of these invoices is as stated in Exhibit P-14(b). These invoices were quarterly billings for the period January through March 1988. None of the invoices contains breakdowns for services and closure, recovery, host community and importation taxes completely, although several on their face, contains billing notations for host community taxes. None of the bills contains notations regarding a specific service billed for, including the frequency and volume of service and rate schedule applied.

53. It is not possible to determine, based on the record in this proceeding, the extent, if any, to which rates charged to its customers by Jersey Carting deviated from its filed tariff because the pertinent bills do not contain disclosure notations regarding specific service, frequency and volume of service, and rate schedule applied. It is also not possible to determine whether or not the rates charged by Jersey Carting were reflective of expedited rate relief awarded by the Board.

54. In the March 16,1988 Order to Show Cause and the June 15, 1988 Order of Investigation and

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Order to Show Cause issued by the Board in this proceeding, the Board directed that Jersey Carting file with the Board within 30 days, to allow the Board to determine the extent of respondents' noncompliance with the rules, regulations and orders of the Board, the following information: (1) a list of current customers served, including each customer's name and billing address, addresses of all service locations, if different from billing address, municipality and county, type of service, size of container, frequency of service, total monthly cubic yardage, if applicable, tariff rate and applicable rate schedules used for services to each customer, total monthly charges without applicable taxes, and applicable taxes charged; (2) copies of any and all service contracts with its customers, including any municipal contracts; (3) copies of all customer billings from December 1986 through May 1988; and (4) copies of all disposal receipts from December 1986 through May 1988. Respondents were ordered, pending a final determination regarding the matter, to include on billings to all customers, in addition to separate line items showing the surcharges pursuant to the Recycling Act, *N.J.S.A.* 13:1E-92 *et seq.*, the Sanitary Landfill Facility Closure and Contingency Fund Act, *N.J.S.A.* 13:1E-100 *et seq.*, the solid waste service tax, the resource recovery investment tax, and if applicable, the solid waste importation tax, N.J.S.A. 13:1E-136 *et seq.*, and regarding said surcharges and taxes, the following information: (1) type of service (residential, commercial, industrial, etc.), (2)

frequency of service, (3) tariff rate applied, (4) number and size of containers, where applicable, and (5) total quantity of waste collected. Similarly, in the Order to Show Cause issued on March 16, 1988 in this proceeding, the Board ordered that respondents file a customer list within 20 days. The content of these orders is as stated in Exhibit P-11.

CONCLUSIONS

The Board has general supervisory and regulatory jurisdiction over solid waste collection utilities pursuant to both its general grant of jurisdiction, *N.J.S.A.* 48:2-13 (Supp. 1991-91), and the Solid Waste Utility Control Act of 1970 (Act), *Id.* §§13A-1 *et seq.* The Act reflects a legislative determination that the collection, disposal and utilization of solid waste is a matter of grave public concern and thoroughly affected with the public interest, *Id.* §13A-2.

Pursuant to the Act, no person shall engage, or be permitted to engage, in the business of solid waste collection until found by the Board to be qualified by experience, training or education and holds a Certificate issued by the Board, *Id.* §6. The Board, on its own initiative, or upon complaint by the DEP, shall revoke, suspend or grant a temporary continuance for up to one year of the Certificate issued to any person engaged in the solid waste collection business upon a finding that such person has violated any provision of the Act or any rule, regulation or administrative order promulgated thereunder, has violated any provision of any laws related to pollution of the air, water or lands of the State, has refused or failed to comply with any lawful order of the Board, or has had its registration revoked by the DEP, *Id.* §9.

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The Board was also given specific authority pursuant to the Act to promulgate rules, regulations and administrative orders pertaining to the regulation of rates and the public utility aspects of the solid waste collection and disposal industries, *Id.* In addition, the Board has the authority to set just and reasonable rates for solid waste utilities pursuant to the Act, *Id.* §7, as well as pursuant to its general regulatory powers over public utilities, *Id.* §2-21.

Any person who violates any provision of the Act or any rule, regulation or administrative order adopted or issued thereunder, including an interdistrict waste-flow order issued in conjunction with the DEP, or under any applicable provision of Title 48, shall be liable for a penalty of not more than $10,000 for a first offense, not more than $25,000 for a second offense, and not more than $50,000 for a third and every subsequent offense. Each day during which the violation continues constitutes an additional and separate and distinct offense. *Id.* §12(b).

The Board has the implied authority pursuant to the Act to exclude individuals from the solid waste business. *Matter of Intercounty Refuse Serv.*, 222 *Super* 258 (App. Div. 1988), *cert gr.*, 111 *N.J.* 618 (1988) *(Intercounty). Matter of Scioscia,* 216 *N.J. Super* 644 (App. Div. 1987), *cert den.* 107 *N.J.* 652 (1987) *(Scioscia).* This authority exists without the necessity of the promulgation of a prior written regulation to that effect, *Intercounty, supra, Scioscia, supra.* In determining whether to revoke an existing Certificate, the Board is not restricted to considering whether the entity in question has violated the Act or implementing regulations but may also consider whether any manager, officer, director or other principal has been guilty of such a violation, *Scioscia, supra.* In practical terms, there is no distinction between the denial of a Certificate and the exclusion

of a principal from the business. *Ibid.* Depending upon the violations implicated, the imposition of an absolute prohibition against an individual's involvement in the solid waste business for an indefinite period is not an excessive sanction, *Intercounty, supra, Scioscia, supra.*

Action by the Board revoking a collector's Certificate, debarring the collector as well as its principals from engaging in the solid waste business, and the imposition of substantial monetary penalties because of the violation of emergency waste-flow orders, as well as tariff rates, has specifically been upheld by our courts, In addition, a calculation of penalties by the Board based upon the treatment of each truckload hauled in violation of waste-flow orders as a separate violation, rather than as one ongoing offense, pursuant to *N.J.S.A.* 48:13A-12(b), is proper. *Matter of Fiorillo Bros. of New Jersey*, 242 *N.J. Super* 667 (App. Div. 1990) *(Fiorillo).*

It is clear, and I **CONCLUDE**, that Jersey Carting violated the June 12, 1987 waste-flow redirection order pertaining to Union County referenced in Finding of Fact No. 4 hereinabove by picking up waste at Hayward Pools' premises in Elizabeth and disposing of such waste at the SWTR Transfer Station in Newark; that Jersey Carting violated the December 29, 1987 redirection order pertaining to Union County referenced in Finding of Fact No. 11 hereinabove on February 24, 1988 by picking up a roll-off container of solid waste at Hayward Pools' premises located in Elizabeth and disposing of such waste at Hub in Newark; that Jersey Carting violated the December 29, 1987 waste flow redirection order pertaining to Union County referenced in Finding of Fact No. 11 hereinabove a total of 28 times in January 1988 by picking up 28 containers of solid waste at Hayward Pools' premises in Elizabeth and not disposing of

such waste at the AMS Transfer Station; that Jersey Carting violated the December 29, 1987 emergency waste-flow redirection order pertaining to Morris County referenced in Finding of Fact No. 15 hereinabove at least 57 times between January 2 and March 21,1988 by providing solid waste collection service to at least 57 customers in Morris County during that period and not disposing of such waste at the MCTSs; that Jersey Carting violated the order referenced in Finding of Fact No. 15 hereinabove by picking up rear-end containers at Paramedical's premises in Pinebrook on February 8, 1988 and not disposing of such waste at the MCTSs; that Jersey Carting violated the order referenced in Finding of Fact No. 15 hereinabove by picking up a 30 yard roll off container at UPS' premises in Parsippany from January 1988 until February 9, 1988 and not disposing of the waste therein at the MCTSs; that Jersey Carting violated the July 24, 1987 waste-flow order regarding Union County referenced in Finding of Fact No. 25 hereinabove on December 23,1987 by disposing of waste originating in Springfield at the BCUA Kingsland Landfill; that Jersey Carting violated the December 29, 1987 waste-flow order pertaining to Union County referenced in Finding of Fact No. 11 on four occasions by collecting solid waste at the premises of Steak & Ale in Clark, the Holiday Inn in Springfield, Federal Pacific in Hillside, and Testrite/Palmer in Hillside and disposing of such waste at the SWTR transfer station in Newark on March 2, 1988; and that Jersey Carting violated the December 29, 1987 waste-flow order pertaining to Union County referenced in Finding of Fact No. 11 during the period January 2, 1988 to March 24, 1988 by providing solid waste collection services to at least eight customers in Union County as referenced in Finding of Fact No. 31 hereinabove, and not disposing of such waste at the AMS transfer Station.

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As noted hereinabove, the Board is empowered to regulate the rates of solid waste collectors through appropriate rules, regulations and orders, *N.J.S.A.* 48:13A-4. I also **CONCLUDE** that Jersey Carting violated the expedited rate relief orders issued by the Board, as referenced in Findings of Fact Nos. 36, 40, 41, 42 and 43, by not utilizing the transfer stations upon which the rates approved therein were based and that Jersey Carting violated the orders referenced in Findings of Fact Nos. 46 through 50 hereinabove by not including the type of service, frequency of service, rate applied, number and size of containers, and total quantity of waste on the invoices referenced in Findings of Fact Nos. 51 and 52 hereinabove.

I am persuaded by the Staff's arguments for the debarment of A. Moriano and M. Moriano, the revocation of Jersey Carting's Certificate, and the imposition of monetary penalties pursuant to the Board's statutory authority, as generally calculated by the Staff. The violations committed by Jersey Carting were of a serious nature and continued for long periods of time. There are no mitigating circumstances. Jersey Carting, in essence, engaged in a flagrant disregard of waste-flow directives and failure to comply with Board directives to provide certain information on customer bills. Each occasion of disposing of waste at other than the facility to which Jersey Carting was directed is, as noted in *Fiorillo*, a separate and distinct violation. The same reasoning is applicable to each invoice which lacked the requisite information. The importance of waste-flow orders to the integrity of the Board's and the DEP's management of solid waste within the State of New Jersey cannot be overstated. As noted by the court in *Fiorillo*:

> . . . it is evident that a significant and legitimate public purpose was served by the

> emergency waste flow orders. These orders are a part of a comprehensive effort to deal with New Jersey's garbage crisis. They permit the coherent planning for the State's interim, as well as permanent, trash disposal needs and provide for dependable disposal of waste. These orders inhibit illegal dumping which establishes the economy of the solid waste facility and creates a health hazard. Additionally, these orders enable the counties to prepare for resource recovery and are a critical component of the State's efforts to insure continued waste disposal. It is uncontroverted that the safe and efficient disposal of the State's waste serves a "significant legitimate" public purpose and the means chosen to implement that purpose are appropriate and reasonable. *Fiorillo* at 682.

As the Staff argues, although the failure to properly itemize customers' bills might not on its face appear to be a significant violation, such failure undermines the Board's ability to exercise its regulatory control over solid waste collectors. The lack of the required information generally, and in this case in particular, negatively impacts upon the Board's ability to determine whether a utility's rates and charges are in accordance with its approved tariff. Solid waste utilities are required by regulation to file tariffs showing the territories served, the standard terms and conditions and the rate schedules for various types of service and contracts, *N.J.A.C.* 14:3-10.10. A utility's approved tariff has the force of law; a utility must charge the rate set forth therein. *Essex Cty Welfare Bd. v. N.J. Bell Tel. Co.*, 126 *N.J. Super*

417 (App. Div. 1974). The failure of Jersey Carting to provide the required information on customer invoices, as well as to bill for services provided pursuant to its filed tariff, are significant violations.

A. Moriano and M. Moriano were, as found hereinabove, principals of Jersey Carting active in all important aspects of its operations during the time period in question. Debarment of these individuals from participation in the solid waste industry, in light of the flagrant disregard of Board directives by Jersey Carting, is warranted. As the Staff argues, it has demonstrated that they lack the requisite qualifications to engage in the solid waste business in accordance with the requirements governing that industry.

Similarly, the Staff has demonstrated by a preponderance of the credible evidence that Jersey Carting's Certificate should be revoked and that monetary penalties should be imposed pursuant to the Board's statutory authority. The Staff argues, in the latter respect, that respondents should be ordered to provide the precise number of loads collected from its Morris and Union County customers during January to March 1988 that were diverted from designated disposal facilities in order to allow the calculation of a precise penalty based on loads diverted. Alternatively, the Staff advances a specific calculation of penalties based on the evidence in the record.

In light of the fact that respondents failed to provide he information referenced, although ordered to do so by the Board in both Orders to Show Causes issued within the context of this proceeding, as well as early discovery orders of this judge, I am persuaded that no additional time should be extended in endeavors, although perhaps warranted, to obtain this data. The

debarment of A. Moriano and M. Moriano, the revocation of Jersey Carting's Certificate, and the imposition of monetary penalties are sufficient to protect the integrity of the Board's regulation of the solid waste industry. The revocation of Jersey Carting's Certificate and the debarment of M. Moriano and A. Moriano from future participation in the State's solid waste industry are not excessive in light of the violations committed, *See, Fiorillo* at 687-688.

The Staff proposes a total penalty of $198,000. The Staff's methodology for calculating penalties (Initial Brief, pp. 63-64 and Supplemental Brief) is, and I so **CONCLUDE**, consistent with *N.J.S.A.* 48:13A-12. This methodology is **ADOPTED** herein. The Staff essentially calculates a $1,000 penalty for each separate violation, except for $5,000 penalties applicable to each order wherein Jersey Carting was directed to provide information on customer billings. It is noted that the treatment of each individual invoice as a separate violation would result in a substantially higher penalty calculation.

I **CONCLUDE** that penalties totaling $109,000 should be imposed upon Jersey Carting for the violations determined hereinabove. This figure is calculated as follows: $1,000 pertaining to the disposal of Haywood Pools' waste on December 30, 1987 at the SWTR Transfer Station; $1,000, to the disposal of Haywood Pools' waste on February 24, 1988 at HUB; $28,000, to the disposal of Haywood Pools' waste during January 1988; $57,000, to the collection of Morris County customers' waste between January and March 1988; $1,000, to the collection of Paramedics' waste on February 8, 1988; $1,000, to the collection of UPS' waste in January and February 1988; $1,000, to the collection of the Boston Tea Party's waste on

December 23, 1987; $4,000, to the collection of waste at the premises of the Steak and Ale, Holiday Inn, Federal Pacific, and Testrite/Palmer on March 2, 1988; $8,000, to the collection of waste of eight Union County customers between January and March 1988; $2,000, to the violation of rate orders generally pertaining to Union County ($1,000) and Morris County ($1,000) customers; and $5,000, to the violation of five orders issued by the Board requiring that certain specified information be included on Jersey Carting's billings.

ORDERS

Based upon the above findings and conclusions, it is hereby, **ORDERED** that A. Moriano and M. Moriano be debarred from owning, operating, managing or controlling or having any interest in any solid waste business organization within the State of New Jersey and from serving as an officer, director, trustee, member of any executive board or similar governing body, or as a principal, manager, partner, employee, agent or in any other capacity thereof, and from owning any outstanding capital stock of, or maintaining directly or indirectly, any financial interest of any nature in any solid waste business, corporation or association doing business in the State of New Jersey; that Jersey Carting's Certificate, No. SW 330, be and is hereby revoked, and that monetary penalties totaling $109,000 be imposed upon Jersey Carting. Neither party addressed in their brief a payment schedule for any imposed penalty. After considering the matter, it is hereby **ORDERED** that Jersey Carting pay the penalty imposed herein within 30 days of the effective date of this decision.

I hereby **FILE** my initial decision with the **BOARD OF REGULATORY COMMISSIONERS** for consideration.

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This recommended decision may be adopted, modified or rejected by the BOARD OF REGULATORY COMMISSIONERS, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the SECRETARY OF THE BOARD OF REGULATORY COMMISSIONERS, 401 East State Street, 7th Floor, West Wing, CN 402, Trenton, New Jersey 08625-0402, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 1992	s/ Diana C. Sukovich
Date	DIANA C. SUKOVICH, ALJ
	Receipt Acknowledged:
[illegible]	s/ illegible
Date	BOARD OF REGULATORY COMMISSIONERS
	Mailed to Parties:
Jan 14 1992	s/ illegible
Date	OFFICE OF ADMINISTRATIVE LAW

le/ms

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Edward Kozak
Frank Capone
Edward Castellano
Jeffrey Callahan
Shrader McCabe
Angela Moriano
Mario Moriano
Scott Shrader

LIST OF EXHIBITS IN EVIDENCE

P-1	Board Order 8311-1032
P-2(A)	Investigative Report (Shrader)
P-2(B)	Investigator Report (Castellano)
P-2(C)	Investigatory Reports (Kozak)
P-3	Certification Tina Graham (McCabe)
P-4	UCUA Tracking Report
P-5(A)	Jersey Carting Customer List (Union County)
P-5(B)	Jersey Carting Customer List (Morris County)
P-7	Certification J. D'Angelo UCUA
P-8	Notice of Prosecution 8-88
P-9	Historical Tipping Report
P-10-(1)	Board Order #SR87070550
P-10-(2)	Board Order #SE87070709
P-10-(3)	Board Order #SE87111308
P-10-(4)	Board Order #SE87111370
P-10-(5)	Board Order #SR87121430

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P-11-(1)	Board Order #SR8504-372
P-11-(2)	Board Order #SR86111288
P-11-(3)	Board Order #SR870706647
P-11-(4)	Board Order #SR87111276
P-11-(5)	Board Order #SR87121430
P-12-(2)	Waste Flow Directive (Morris 12/29/87)
P-12-(3)	BPU/DEP Waste Flow Order (Union 8/1/87)
P-12-(4)	BPU/DEP Waste Flow Order (Union 12/29/87)
P-12-(5)	BPU/DEP Waste Flow Order (Union 8/5/88)
P-14(A)	Jersey Carting Customer Bills (Union)
P- 15	Responses to Staff Interrogatories
P-17	Certification J. Bocchion (BCUA)
P-18	Photo at Rajotti Construction
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P-25	Photo at Hayward Pools
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P-27	Photo at Hayward Pools
P-28	Photo at Hayward Pools
P-29	Photo at Hayward Pools
P-30	Jersey Carting Tariff
P-31	Investigator Report 4/24/90
P-32	Contract AMS & UCUA 12/29/87
P-33	Photo Palmer Video
P-34	Photo Paramedical Home Support
P-34(A)	Jersey Carting Expedited Petition (Union)
P-34(B)	Jersey Carting Expedited Petition (Morris)
P-35	Photo Paramedical Support
P-35(M)	Jersey Carting Certification of Mario Moriano (Morris)
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Appendix B

P-37	Photo UPS Parsippany
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APPENDIX C — FINAL DECISION OF THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION DATED DECEMBER 11, 1992

BOARD OF REGULATORY COMMISSIONERS

Petitioner,

v.

JERSEY CARTING INC., ANGELA MORIANO, AND MARIO MORIANO,

Respondents.

Environmental Protection and Energy

OAL Docket Nos. ESW 4898-88 and ESW 3363-88
(consolidated)
Agency Docket Nos. SS88030449 and SS88050695

Initial Decision: January 7, 1992
Final Agency Decision: December 11, 1992

SUMMARY

Environmental Law — Waste Disposal

Solid waste collector censured and penalized for repeatedly violating site specific waste-flow orders

The Department of Environmental Protection and Energy affirmed the Board of Public Utilities' order of violations and penalties, holding there was ample evidence to support the

findings that a licensed solid waste collector violated its waste-flow orders by failing numerous times to dispose of waste in accordance with its authorized specific disposal sites and by not charging certain customers the rate mandated by its approved tariff.

In 1988, the Board of Public Utilities issued an order to show cause to respondent Jersey Carting, Inc., alleging that it violated its solid waste collector certificate by violating the Department of Environmental Protection's (DEP) and petitioner Board of Regulatory Commissioners' (Board) waste-flow orders. The Board alleged that Jersey Carting was not using its disposal station site as directed.

An administrative law judge (ALJ) was persuaded by the evidence presented by the Board's staff, except as to certain specific tariff violations. The ALJ found the staff's evidence focused upon alleged tariff violations concerning specific billings and several quarterly billings, which the ALJ found too ambiguous to be actionable. The ALJ criticized Jersey Carting for its principals' failure to testify. The ALJ determined that Jersey Carting violated its waste-flow redirection order many times by picking up waste at various sites and disposing the waste at inappropriate transfer stations. The ALJ also found that Jersey Carting violated the expedited rate relief orders issued by the Board by not including the type of service, frequency of service, rate applied, number and size of containers, and total quantity of waste on the invoices. The ALJ concluded that penalties totalling $109,000 should be imposed. The ALJ also concluded that Jersey Carting's principals should be debarred from owning, operating, managing, or controlling or having any interest in any solid waste business organization within the state.

The Commissioner of the Department of Environmental

Protection and Energy adopted the ALJ's recommendation with modification by adding in the tariff that the ALJ removed, holding that the undisputed record amply supported the ALJ'S findings of specific violations and sanctions recommended. The record also supported the finding of tariff violations because Jersey Carting violated the Board's expedited rate relief orders by not charging certain customers the rate mandated by its approved tariff. The Commissioner ordered the payment of an additional $77,000 in penalties for Jersey Carting's failure to dispose of waste in accordance with the site-specific disposal sites established by its tariff.

* * *

Pages 57 through 67 of the Final Decision of the Commissioner of the New Jersey Department of Environmental Protection dated December 11, 1992, are a verbatim repetition of the Initial Decision of the Office of Administrative Law, which appears at pages 2a-53a of this appendix. As such, the Initial Decision of the Office of Administrative Law has been omitted from the Final Decision of the Commissioner of the New Jersey Department of Environmental Protection as it appears in this appendix.

Appendix C

FINAL AGENCY DECISION

WEINER, Commissioner:

This matter is before me[1] for Final Decision following the Initial Decision by Administrative Law Judge Diana Sukovich (ALJ). In it, after finding that Jersey Carting had violated waste flow directives and interim rate relief orders, the ALJ recommended that the certificate of public convenience and necessity held by Jersey Carting, Inc. to operate as a solid waste collector be revoked, that Angela Moriano and Mario Moriano be debarred from the solid waste industry and that penalties in the amount of $109,000 be assessed. After carefully considering the record before the ALJ as well as the exceptions filed to the Initial Decision, and after having given the parties ample opportunity to try to achieve an amicable settlement of the matter, I am satisfied that because of the seriousness of the violations found to have been committed by Jersey Carting, Inc., and its principals, Angela and Mario Moriano, that the undisputed record amply supports the findings of specific violations and sanctions recommended by the ALJ. I am also convinced for the reasons set forth more fully below that the record supports the finding of tariff violations such that the ALJ's decision in that regard will be modified. In view of my general acceptance of the ALJ's decision, this order will only address that area where I am modifying the ALJ's decision and issues raised since the issuance of the Initial Decision.

Turning to the exceptions, Jersey Carting presented a number of unpersuasive arguments. Jersey Carting first argues that the ALJ erred by striking certain porions of the post-hearing brief because these matters went to extenuation and mitigation. Indeed, this theme of inability to present mitigation, particularly

in relation to dumping at Hub,[2] runs through most of Jersey Carting's exceptions. Jersey Carting begins with two orders in connection with the Hub case entered by the bankruptcy court, two letters of solicitation from Hub as well as settlement papers in connection with another action brought against Jersey Canting by the Union County Utilities Authority. Jersey Carting had unsuccessfully moved for the admission of these materials at trial and then simply appended them to its post-hearing brief under the stated misapprehension that the hearing was narrowly limited to a determination of liability. Staff successfully moved to suppress these materials.

Clearly, both orders to show cause made it clear that the issue of sanction was before the factfinder such that any evidence in mitigation should have been presented at trial. As the ALJ noted, the material consisted of "documents which are not marked for identification during seven days of evidentiary hearings conducted in this matter nor provided during discovery."

Jersey Carting's basis for failure to offer mitigation is obscure. No pleading or anything else in the record provides a plausible basis for Jersey Carting's theory of bifurcation. Nonetheless, particularly in view of the seriousness of the sanctions recommended, I HEREBY ORDER that the Hub bankruptcy orders be judicially noticed for consideration here.[3] For the same reason I further have determined to consider the mitigating arguments presented by Jersey Carting.

Turning to these arguments in more detail, judicial notice is appropriately taken of the Hub orders. Having included these orders in the record, I find, however, that regardless of the orders, and indeed of any solicitation, the applicable waste flow orders

unequivocally directed waste to the lawful county transfer stations in compliance with solid waste franchises. These orders and franchises are the linchpin of the State's approach to comprehensive solid waste planning.

Examining the other mitigating factors, all of these arguments may be rejected. The argument that the company was financially straitened by the change in disposal site falls before the opportunity to obtain expedited rates, an opportunity actually taken by Jersey Carting. Moreover, the strong public policy reasons, such as long-range solid waste planning, behind the waste flow orders more than offset the "difficulties" of being in the solid waste business. Further, lawlessness by some haulers has a severely deleterious effect on all law-abiding haulers and their customers. Indeed, self-help disposal decisions harm lawful haulers unable to compete with costs rendered artificially low by unlawful dumping.

Continuing with Jersey Carting's arguments in mitigation, I expressly reject the contention that the Company's return to lawful disposal sites should have an ameliorative effect on the sanctions. Having opted to violate the law, Jersey Carting should not now be given credit for finally acting as it should have from the outset. Moreover, a more cynical explanation for the change in heart might be found in the success of other enforcement actions for violations of solid waste laws and regulations. *See, e.g., Mater of Fiorillo Bros. of N.J.*, 242 *N.J. Super.* 667 (App. Div. 1990), certif. den. 122 *N.J.* 363 (1990).

Turning to its other exceptions, Jersey Carting argues against the ALJ's having taken an adverse inference against the Morianos for their refusal to answer any questions based on the Fifth Amendment's protection against self-incrimination. In

rejecting this exception, I would note particularly that Jersey Carting asserts this argument without the support of a single case and without even attempting to distinguish the long line of cases urged by the Staff which support this practice. *Mahne v. Mahne*, 66 *N.J.* 53 (1978). Thus, it is plain that this exception be rejected *in toto*.[4]

Jersey Carting's arguments as to the principals are similarly weak. Although not recited in the Initial Decision, Staff asked, and the Morianos declined to answer, numerous questions regarding their role in the company. Thus, these inferences stand, as observed above, in addition to the Morianos' undisputed and continuing role as officers and directors of the company. *E.g.*, *Matter of Scioscia*, 216 *N.J. Super*, 644 (App. Div. 1988). I would also point to *Francis v. United Jersey Bank* 87 *N.J.* 15 (1981), where the New Jersey Supreme Court held even the most inactive directors to a high degree of culpability for corporate misconduct.

Next, Jersey Carting excepts to various factfinding. Again, it bears emphasis that the record shows essentially no disputes as to the facts. Based on such facts, the ALJ made reasonable and appropriate findings. Moreover, a single event may represent more than one violation, *e.g.*, violation of waste and tariff. The exceptions themselves generally demonstrate Jersey Carting's rather loose approach to tariffs. While it is black-letter law that a tariff is a contract which must be followed strictly, *e.g.*, *Essex Cty. Welfare Bd. v. N.J. Bell Tel. Co.*, 126 *N.J. Super.* 417, 421 (App. Div. 1974), Jersey Carting's argument appears to be that a tariff is some sort of guidance to a ceiling price such that only overcharges are violative of the law. This is plainly incorrect.

Finally, on the issue of mitigation, Jersey Carting's view

that it should be given yet more time to comply with promulgated regulations and no less than two Board orders is firmly rejected.

Turning to Staff's exceptions, as noted at the outset, I am persuaded that the record amply demonstrates tariff violations for which penalties must be assessed. The ALJ did determine that Jersey Carting did violate the expedited rate relief orders of the then Board of Public Utilities.[5] The undisputed testimony of Paul Katz, the Board's Chief Auditor, was that because Jersey Carting's expedited filings and resulting tariff rates for its Union and Morris customers were predicated on the cost of a specific disposal site, the waste collected by Jersey Carting in the affected counties would have to be deposited at the disposal site upon which the tariff rate was premised (Transcript. Sept. 27. 1990, at 18). Katz repeatedly testified that a hauler would violate the Board-approved tariff if the hauler failed to deposit the waste at the disposal site on which their tariff was premised. *Id.* at 18 to 22.

More specifically, Katz examined the appropriateness of Jersey Carting's tariff with regard to two customers: UPS and Hayward Pools. *Id* at 82. He then specifically determined, without a scintilla of contradiction, that in both instances, Jersey Carting did not charge these customers the rate mandated by the Company's approved tariff (P-30 in Evid.). Regarding the rates charged by Jersey Carting to its other 60 Morris County customers and 10 Union customers reflected in Jersey Carting's bills (P-14(a) and P-14(b) in Evid.), a more precise analysis of the degree of deviation from tariff, beyond the failure to use the authorized disposal site, could not be conducted because Jersey Carting's own billing structure failed to contain required billing disclosures as to the specific service, including the frequency and volume of service and rate schedule applied. *Id.* at 84, 127.

Accordingly, having found these facts, and in that the record includes 77 bills for customers for which Jersey Carting failed to utilize the correct disposal site, I find a tariff violations therefor and assess an additional $77,000 in penalties.

Accordingly, I HEREBY ACCEPT the Initial Decision except insofar as the ALJ failed to find that Jersey Carting had violated its tariff by failing to dispose of waste in accordance with the site-specific disposal sites established by its tariff such that I HEREBY MODIFY the Initial Decision to reflect the findings above and HEREBY ORDER the payment of an additional $77,000 in penalties.

Before addressing transition of service for Jersey Carting's customers, I would note that this decision and particularly the sanctions of revocation of certificate of public convenience and necessity and debarment of the principals make clear the determination of the State of New Jersey to foster the long-standing legislative goal of lawful competition in the solid waste industry. That competition must occur within the framework of solid waste franchises and solid waste flow regulations and orders established by the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., and the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. In view of upcoming consideration of waste flow orders by the New Jersey Supreme Court in *In the Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Hudson County Solid Waste Management District*, 258 *N.J. Super.* 290 (App. Div. 1992), certif. granted,__ N.J. __ (1992), I would emphasize the significant financial and public policy considerations underlying solid waste flow orders and compliance therewith by haulers. This hauler opted on its own to ignore its lawful tariff and waste flow orders as a business decision. This decision plainly has a negative impact on the various counties and utilities

authorities which have shouldered their solid waste responsibilities by planning, financing, building and operating solid waste facilities for which a constant flow must be maintained to insure economic viability. Just as critically, this type of decision gives a tariff-violator hauler an undue advantage over tariff-observer haulers struggling to survive in a challenging industry and indeed induces the latter to similarly reject compliance with solid waste regulations.

In order to ensure the orderly provision of alternate service for Jersey Carting, Inc. customers. I HEREBY DIRECT Staff to convene a meeting of all solid waste haulers authorized to provide service in the service territories in question. Staff shall also provide Jersey Carting, Inc. customers with a list of those collectors authorized to provide service. In the event any customer shall be unable to obtain alternate service, a collector may be directed to provide service pursuant to N.J.S.A. 48:2-23 and N.J.S.A. 48:13A-7.18.

Furthermore, Jersey Carting, Inc., Angela Moriano, Mario Moriano or any employee of Jersey Carting, Inc. shall not arrange for or take any action with regard to the provision of service to Jersey Carting Inc.'s former customers by either recommending possibly alternate collectors to customers, by contracting with other collectors for the sale of customer accounts, by providing a list of customers to another solid waste collector or by any other means including but not limited to the above.

Furthermore, Jersey Carting, Inc., Angela Moriano, Mario Moriano are hereby prohibited from selling, assigning, transferring, leasing, mortgaging, merging, loaning, hypothecating or otherwise disposing of or encumbering Jersey Carting, Inc. property, or any part thereof, without the written

prior approval of the Department. This order shall apply to all assets of every nature held or utilized by respondents in connection with any solid waste business as defined in N.J.S.A. 48:13A-3 and shall specifically include, but shall not be limited to, the following assets: customer accounts and routes; commercial, municipal and residential solid waste collection contracts; all tangible property, such as trucks and containers, utilized in the collection and disposal of solid waste.

It is further ORDERED that to ensure continued compliance with this Order, Jersey Carting, Inc., Angela Moriano and Mario Moriano shall submit to the Department for its review seven days from the effective date of revocation, a sworn affidavit stating that they have ceased all utility operations in the State of New Jersey and specifying all actions taken, in compliance with the within order. The affidavits shall also state that respondents have not arranged for the provision of service to former Jersey Carting, Inc. customers by other collectors, by either recommending possible alternate collectors to its customers, by contracting with other collectors for the sale of customer accounts, by providing a list of customers to another solid waste collector or by any other means including but not limited to the above.

The certificate of public convenience and necessity issued to Jersey Carting, Inc. is HEREBY ORDERED REVOKED ten (10) days following the customer distribution meeting to be convened by Staff. The debarment of Angela Moriano and Mario Moriano from the solid waste industry is effective on the same date as the effective date of the revocation. The penalty of $186,000 is due thirty (30) days from the date of this Order.

SUBSEQUENT HISTORY
affirmed, No. A-1803-92 (App. Div. August 31, 1994)

Appendix C

1. Pursuant to Reorganization Plan No. 002 (1991), which became effective on August 19, 1991, all responsibility and authority formerly vested in the Board for the economic regulation of solid waste utilities has been transferred to the newly-reorganized Department of Environmental Protection and Energy. Accordingly, the within matter is appropriately before the Department for review and decision. Occasional references to the Board reflect this history.

2. Hub refers to the notorious unlicensed solid waste facility in Newark, New Jersey. The solid waste on site caught fire in August 1989 leading to the temporary closure of adjacent Route 78. This order does not attempt to recreate the complete procedural history related to Hub.

3. While I have determined to take judicial notice of these orders, inclusion of the letters of solicitation and the settlement is inappropriate as argued in Staff's exceptions.

4. I would note that since the issuance of the Initial Decision, the criminal proceeding which was the presumed basis for the assertion of the Fifth Amendment has been reversed, *State of New Jersey v. Jersey Carting Inc.*, 259 *N.J. Super.* 130 __ (App. Div. 1992), pet. for certif. pending. This does not change the appropriateness of taking an adverse inference from silence under the case law referenced above. Without commenting on the correctness of the decision. I would note that the ALJ did, in fact, refuse to consider the conviction in making her recommendation. Finally, the basis of the reversal of conviction in no way disturbs the findings of the ALJ.

5. In reviewing this Initial Decision, I note that Staff did not seek voiding of the expedited tariffs and refunds to customers as it might have done pursuant to *I/M/O A. Fiore & Sons*. Order Adopting Initial Decision in Part and Modifying Initial Decision in Part, BPU Dkt. No. SR8809034. Nov. 28, 1989. While the Initial Decision could be so modified to direct those actions, both in view of the other sanctions herein imposed and the effective mootness of such action, I will not do so.

I would also note that I have adopted the penalty calculation methodology urged by Staff below and essentially adopted by the ALJ. These penalties reflect the then statutory penalty amounts which have subsequently been increased by the Legislature.

APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DATED AUGUST 31, 1994

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1803-92T2

BOARD OF REGULATORY COMMISSIONERS,

Petitioner-Respondent,

v.

JERSEY CARTING, INC., ANGELA MORIANO and MARIO MORIANO,

Respondents-Appellants.

Argued April 18, 1994 — Decided Aug 31 1994

Before Judges Muir, Jr., Thomas and Levy.

On appea from the Final Decision and Order of the Commissioner of the New Jersey Department of Environmental Protection and Energy.

John T. Ambrosio argued the cause for appellant (Gabriel M. Ambrosio, attorney and of counsel.)

Appendix D

D'Andre Workman argued the cause for respondent (Deborah T. Poritz, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel).

PER CURIAM

Appellants Jersey Carting, Inc., Angela Moriano and Mario Moriano, appeal from the final decision of the Commissioner of the Department of Environmental Protection and Energy (DEPE) which revoked the Certificate of Public Convenience and Necessity (required to engage in solid waste collection and disposal in New Jersey) of Jersey Carting, permanently barred its principals, Angela and Mario Moriano, from further participation in the solid waste industry in New Jersey and fined Jersey Carting $186,000.

On appeal, appellants raise the following issues:

POINT ONE

IN VIEW OF INTER-RELATED CRIMINAL PROSECUTION, IT WAS FUNDAMENTALLY UNFAIR TO REQUIRE THE APPELLANTS TO PARTICIPATE IN THE ADMINISTRATIVE ENFORCEMENT PROCEEDING; THESE PROCEEDINGS SHOULD BE REMANDED TO THE AGENCY TO ALLOW APPELLANTS TO PRESENT THEIR DEFENSE.

Appendix D

POINT TWO

THE RECORD BELOW DOES NOT SUPPORT THE FACTUAL FINDINGS AND CONCLUSIONS OF LAW OF THE COMMISSIONER.

A. THERE IS INSUFFICIENT EVIDENCE ON THE RECORD TO SUPPORT THE HAYWARD WASTE FLOW AND TARIFF VIOLATIONS.

B. THERE IS NO EVIDENCE ON THE RECORD TO SUPPORT THE 77 TARIFF VIOLATIONS FOUND BY THE COMMISSIONER.

POINT THREE

THE SETTLEMENT WITH THE UCUA PRECLUDES THE DEPARTMENT FROM ASSESSING PENALTIES FOR ANY UNION COUNTY WASTE FLOW VIOLATIONS WHICH OCCURRED BETWEEN JANUARY 2, 1988 AND FEBRUARY 24, 1988.

POINT FOUR

THE EMERGENCY REDIRECTION ORDERS WERE ADOPTED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT; THEREFORE, THEY ARE UNENFORCEABLE.

Appendix D

POINT FIVE

THE SANCTIONS AND PENALTIES IMPOSED BY THE COMMISSIONER WERE ARBITRARY, UNREASONABLE AND CAPRICIOUS; THEREFORE, THEY SHOULD BE SET ASIDE.

A. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE REVOCATION OF JERSEY CARTING'S LICENSE AND THE DISBARMENT OF ANGELA AND MARIO MORIANO WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND, THEREFORE, SHOULD BE SET ASIDE.

B. THE COMMISSIONER IMPROPERLY ASSESSED SEPARATE PENALTIES FOR THE UNION COUNTY TRANSFER STATION VIOLATIONS, THE MORRIS COUNTY TRANSFER STATION VIOLATIONS AND THE TARIFF VIOLATIONS.

POINT SIX

THE EMERGENCY WASTE FLOW ORDERS DIRECTING ALL SOLID WASTE TO AUTHORIZED TRANSFER STATIONS VIOLATE THE COMMERCE

Appendix D

CLAUSE OF THE UNITED STATES CONSTITUTION. (Raised for the first time on this appeal.)

On March 24, 1988, the Board of Public Utilities (Board)[1] issued an order to show cause against appellants alleging violations of the Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-1 to -13; the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 to -207; an order for termination of landfill operations; two emergency redirection of solid waste flow orders, and rules promulgated pursuant to the Acts. On June 15, 1988, the Board issued a second order to show cause against appellants alleging additional violations of waste flow directives, the two Acts, the rules promulgated pursuant to the Acts, and certain tariffs.

These orders to show cause charged Jersey Carting with illegally picking up and disposing of 102 containers of solid waste and committing 84 tariff violations for which the Board sought civil penalties; sanctions; revocation or suspension of Jersey Carting's Certificate of Public Convenience and Necessity; debarment of Angela and Mario Moriano from the solid waste industry in New Jersey; compliance with solid waste flow rules and redirection orders; collection of revised rates from Jersey Carting's customers; dismissal of petitions for expedited rate relief; and a declaration that Jersey Carting's authorized interim rate relief be declared null and void. The

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1. In 1991, the Board of Public Utilities was redesignated as the Board of Regulatory Commissioners, and at the same time, the Department of Environmental Protection became the Department of Environmental Protection and Energy. *See N.J.S.A.* 13:1D-1 (sets forth in full Reorganization Plan No. 002-1991). The designation "Board" will be used in this opinion without distinction to refer to both the Board of Public Utilities and the Board of Regulatory Commissioners.

orders to show cause were consolidated but prior to the start of hearings, appellants moved for a stay of the administrative hearings, pending resolution of a criminal case involving Jersey Carting. Their motions to stay were denied and hearings on the alleged violations began.

By way of background, on June 12, 1987, the Board and the DEPE issued a joint order which directed that waste generated in Union County be sent to a landfill located in Middlesex County. On July 24, 1987, the Board and the DEPE issued a joint emergency waste flow order, effective August 1, 1987, directing solid waste generated in Springfield Township, Union county, to the Automated Modular Systems, Inc. Transfer Station (AMS) in Linden, Union County.

On December 29, 1987, the Board and DEPE issued two more emergency waste flow orders which became effective January 2, 1988. The first order directed that certain types of solid waste generated in Elizabeth and most other Union County municipalities be taken to AMS. The second order directed that Morris County solid waste be taken to two transfer stations operated by the Morris County Transfer Station, Inc. (MCTS) in Mount Olive Township and Parsippany-Troy Hills Township. Simultaneously with these orders, the DEPE authorized expedited rate-relief proceedings for solid waste collectors affected by the redirection of solid waste in these two counties.

In the last week of December 1987, Jersey Carting prepared and mailed advance bills to all of its customers for the first quarter of 1988 based upon the old dumping regulations. When the new dumping orders were issued, Jersey Carting filed petitions for expedited rate relief and was granted interim rates for its collection service in Union and Morris Counties effective

January 1, 1988. In both of its expedited rate petitions, Jersey Carting asserted that the redirection of waste flow in Union and Morris Counties would significantly impact upon its operating costs and that without a rate increase, Jersey Carting might not be able to comply with the waste flow orders. Jersey Carting therefore requested an interim increase to reflect the increased operating costs of dumping in those counties effective January 1, 1988.

Thereafter, a thorough and extensive investigation of Jersey Carting's actual waste disposal revealed widespread and continued disregard of the amended dumping orders. During the early part of 1988, it was determined that Jersey Carting continually dumped waste at Hub Recycling, Inc. (HUB) in Newark as well as other unauthorized locations.

At the hearings, the Board presented eight witnesses and introduced into evidence fifty-two exhibits, investigative reports and photographs, together with other records and supporting documents. One of the witnesses, Frank Capone, Vice President and Chief of Operations at AMS, and Jeffrey Callahan, Deputy Director at the Union County Utility Authority (UCUA), testified that AMS and UCUA records showed that appellants failed to tip (dump) a single load of solid waste at AMS from January 2, 1988, until March 25, 1988. Another witness, Edward Kozak, also testified that Jersey Carting was not tipping at AMS. Tina McCabe, staff accountant at MCTS, testified that Jersey Carting did not dump at the MCTS facility until March 22, 1988. At the hearings, Angela and Mario Moriano did not testify and exercised their Fifth Amendment rights refusing to respond to any questions posed by the Board. They also did not present any witnesses on their behalf.

Appendix D

The administrative law judge ultimately concluded: "It is reasonable to infer that A. Moriano and M. Moriano instructed Jersey Carting waste collection vehicles to by-pass the Morris County and Union County designated transfer stations and that the Morianos determined to by-pass these transfer stations during the periods in question." This conclusion was then accepted by the Commissioner.

We find there was substantial credible and competent evidence to support the Commissioner's decision for what amounted to the deliberate disregard to tariff directives and emergency waste flow orders by appellants. We also find no merit to the legal issues raised by appellants and affirm. In doing so, we respond to each of appellants' issues in the order raised.

ISSUE I

Appellants assert that in view of an interrelated criminal prosecution, it was fundamentally unfair to require them to participate in the administrative proceedings. They say a stay should have been granted and request a remands to present their defense. In doing so, appellants rely on the test set forth in *State v. Kobrin Sec., Inc.*, 111 *N.J.* 307 (1988), which establishes the following criteria for determining whether to grant a stay when there are concurrent civil and criminal charges. In such an instance, the trial judge must determine: (1) whether in the civil proceeding the government seeks *only* a monetary penalty against the defendant; (2) whether the two actions are nearly identical in scope; and (3) whether the relief sought in the civil proceeding is intended to prevent continued injury to the public. *Id.* at 313-15.

In *Kobrin*, the Court addressed whether the State may

proceed with a civil fraud action against several securities dealers while some of them were subject to pending criminal charges arising out of the same transaction. *Id.* at 310. The Court held that if the dealers could be found unqualified to serve in the securities profession, the licensure proceedings against them should not be stayed. *Id.* at 315. The Court emphasized that the State had no burden to demonstrate its right to proceed with the civil case. *Id.* at 316. Instead, the burden was placed on the dealers to show how their rights outweighed the public interest. *Ibid.* In addition, the Court noted that particular civil proceedings have been stayed only when their continuation would expose a litigant to undue risk of losing the civil case or initiation of criminal prosecution. *Id.* at 314.

In the proceeding at issue here, the Board did not *only* seek a monetary penalty. The Board sought civil penalties; sanctions; revocation of Jersey Carting's Certificate of Public Convenience and Necessity; debarment of Angela and Mario Moriano from the solid waste industry, and other relief. In addition, the scope of the two actions was not even close. The breadth of the criminal indictment was very limited in comparison to the range of violations alleged by the agency. The criminal indictment against Jersey Carting simply charged it with third-degree theft by deception, in violation of *N.J.S.A.* 2C:2-6, *N.J.S.A.* 1C:2-7 and *N.J.S.A.* 2C:20-4, for creating and reinforcing the false impression that solid waste removed from premises operated by United Parcel Service and Hayward Pool Products, Inc. by Jersey Carting, Inc. was transported to and dumped at county transfer stations authorized by the New Jersey Department of Environmental Protection" when it was instead dumped at Hub Recycling. While appellants concede that the underlying administrative proceeding was broader than the concurrent criminal action, they argue that *Kobrin's* third factor (danger to

the public) is missing. This argument is based on the fact that the Board never sought emergent injunctive relief, which appellants contend evidences the lack of on-going danger to the public.

Appellants had the burden to demonstrate how their rights outweighed the public interest. *Kobrin, supra,* 111 *N.J.* at 316. It is well settled that New Jersey faces a solid waste disposal crisis caused by the shortage of adequate solid waste disposal facilities and a significant and legitimate public purpose is served by waste flow orders. *A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't,* 90 *N.J.* 666, 670 (1982); *In re Fiorillo Bros. of N.J.,* 242 *N.J. Super.* 667, 682 (App. Div.), *certif. denied,* 122 *N.J.* 363 (1990). The public interest in enforcing a comprehensive effort to deal with this crisis is strong and is weakened by illegal dumping which destabilizes the economy and creates a health hazard. *Ibid.* Since the public interest in preventing illegal dumping was substantial and the scope of the criminal case limited in comparison to the civil proceeding, we hold that it was not fundamentally unfair to require appellants to participate in the administrative proceedings.

ISSUE II

Appellants argue that there was insufficient evidence to support the findings and conclusions of the Commissioner as to the waste flow and tariff violations. In doing so, "[a]ppellants maintain that because the alleged tariff violations were predicated on *advance* quarterly billings which were issued by Jersey Carting prior to the effective date and signing of the interim rate relief orders, the Department failed to offer evidence of a violation." According to appellants, "[t]his contractual relationship [with its Union and Morris County customers] prohibited Jersey Carting from applying the interim rates until

after the advance billing period had expired." That being the case, appellants submit that "the Commissioner's finding that Jersey Carting violated its tariff on 77 occasions must be set aside."

Not so. "It is well established that a tariff required by law to be filed . . . is not a mere contract; it is the law. As such, it is binding upon subscribers whether the customer knows of the regulation or not." *Essex Cty. Welfare Bd. v. New Jersey Bell Tel. Co.*, 126 *N.J. Super.* 417, 421-22 (App. Div. 1974) (citations omitted). *Accord In re Application of Saddle River*, 71 *N.J.* 14, 29 (1976); *Valentine v. Eastern Airlines, Inc.*, 144 *N.J. Super.* 305, 308-09 (App. Div. 1976); *New Jersey Bell Tel. Co. v. West Orange*, 188 *N.J. Super.* 455, 459 (App. Div. 1982), *certif. denied*, 93 *N.J.* 283 (1983); *Wave Electronics v. UPS*, 254 *N.J. Super.* 201, 203 (Law Div. 1991). After the tariff is filed, it is "applicable equally to *all* customers." *Saddle River, supra*, 71 *N.J.* at 29 (emphasis supplied); *see also New Jersey Bell, supra*, 188 *N.J. Super.* at 458. Those customers who are already under contract for a lower rate cannot complain because " '[e]very contract is made subject to the condition that its fulfillment may be frustrated by a proper exercise of the police power.' " *South Hamilton Assoc. v. Mayor and Coun. of Morristown*, 99 *N.J.* 437, 444-45 (1985) (quoting *Albigese v. City of Jersey City*, 127 *N.J. Super.* 101, 113 (Law Div. 1974) (citing *Veix v. Seneca B. & L. Ass'n*, 126 *N.J.L.* 314, 320 (E. & A. 1941); *American Budget Corp. v. Furman*, 67 *N.J. Super.* 134, 144 (Ch. Div. 1961), *aff'd*, 36 *N.J.* 129 (1961)). *Accord In re Fiorillo Bros. of N.J., supra*, 242 *N.J. Super.* at 680-82 (which explains that substantial impairment of existing contracts by the Board under *N.J.A.C.* 7:26-6.5 does not violate the contract clause of the federal Constitution, *U.S. Const.*, art. I, § 10, cl. 1, because such actions are valid exercises of the inherent police power of the State to

safeguard the vital interests of its residents as to waste disposal); *Vasquez v. Glassboro Svc. Ass'n*, 83 *N.J.* 86, 98 (1980) ("No contract can be sustained if it is inconsistent with the public interest or detrimental to the common good"). *Cf.* 64 *Am. Jur. 2d Public Utilities* § 81 (1972) ("private contracts with . . . utilities are regarded as entered into subject to reserved authority in the state acting directly or through a public service commission or municipal corporation, under the police power or express statute or constitutional provision, to modify the contract rate in the interest of public welfare"); *Ibid.* ("where a consumer contracts for a supply of gas from one not then acting as a public utility, but under such conditions that it is evident that public service is contemplated, the contract becomes subject to public regulation, and the rate may be increased without constitutionally impairing the obligation of the contract").

While Jersey Carting was under contract for lower rates to its Union and Morris County customers prior to the effective date of the interim tariff rate orders, Jersey Carting applied for and received interim rates, effective January 1, 1988, shortly after the mailing of its advance quarterly bills. In support of that application, Mario Moriano submitted a certification for rate relief containing the following statements:

> [I]n consideration of my authorization by the BPU to expeditiously impose upon my customers an increase which reflects an appropriate amount of increased disposal expenses as computed through these procedures, rather than proceeding through the regular rate case process, I agree on behalf of my company to all the conditions set forth in these new procedures

> (incorporated herein by reference) adopted for use in my case, including, but not limited to, the provisions calling for the automatic refund with interest, of rates found to be too high . . . and *all* provisions regarding the consequences of my company's charging rates incorrectly, or my company's non-compliance with any time requirements or disposal site requirements provided for in the procedures, regardless of costs. (Emphasis added.)

Jersey Carting did not charge its Union and Morris County customers the interim tariff rates, effective January 1, 1988, for waste disposal in those counties. The Commissioner's finding of seventy-seven violations was, therefore, well supported and reasonable upon the proofs, *Zielenski v. Board of Review, Div. of Emp. Sec.*, 85 *N.J. Super.* 46, 54 (App. Div. 1964), and is affirmed.

ISSUE III

Appellants contend, based on the doctrine of *res judicata*, that their settlement with the Union County Utilities Authority (UCUA) precludes the DEPE from assessing penalties for any Union County waste flow violations occurring between January 2, 1988 and February 24, 1988. We disagree.

On April 26, 1988, the UCUA brought an enforcement action in the Chancery Division against Jersey Carting and other haulers, alleging that since the commencement of operations by AMS, the haulers had failed to obey a waste flow order requiring them to haul refuse to the AMS facility. The UCUA alleged that

from January 2 through February 24, 1988, Jersey Carting removed solid waste from a Union County site, Hayward Pool, and delivered it to dumping sites other than AMS. The UCUA sought judgment against Jersey Carting, enjoining it from transporting solid waste in Union County in violation of the applicable emergency waste flow order and compelling it to honor UCUA's franchise and to transport solid waste to AMS. The UCUA requested compensatory and punitive damages, costs of suit, counsel fees, and interest.

On March 19, 1990, Jersey Carting and the UCUA entered into a settlement of that action in which Jersey Carting agreed to pay the UCUA $15,690.88. The settlement provided that it "shall be deemed as full and complete satisfaction of all claims actual and potential, in the above-cited case between the UCUA and Jersey Carting arising out of any and all activity of Jersey Carting in Union County within the jurisdiction of the UCUA."

In order for *res judicata* to apply, three basic elements must be met: (1) there must be a valid final judgment on the merits in the prior action; (2) the parties in the later action must be identical to or in privy with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 *N.J.* 398, 412 (1991). Two of these elements are not in place here; *i.e.*, final judgment on the merits and identity of parties. Accordingly, the doctrine does not apply.

ISSUE IV

Appellants next argue that certain emergency redirection orders adopted by the Board were done so in violation of the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to -21,

and are unenforceable. On December 29, 1987, pursuant to *N.J.A.C.* 7:26-6.7, there were issued Emergency Redirection Orders which, effective January 2, 1988, redirected solid waste flows originating in Union and Morris Counties. The issue of amended orders made in violation of the APA was addressed in *In re Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Hudson Ct. Solid Waste Management Dist.*, 258 *N.J. Super.* 290, 297-98 (App. Div. 1992), *aff'd in part, rev'd in part,* 133 *N.J.* 206 (1993). There, the Supreme Court held that while a contested new waste flow order was not adopted in a procedurally proper manner, it was adopted based upon statutory authority. 133 *N.J.* at 222-23. The Court, therefore, concluded that the order was not *ultra vires,* since any procedural flaws or deficiencies could be remedied by the agencies. *Ibid.* The Court also held that the adoption of curative regulatory measures to validate the plan amendment and redirection order could be applied retroactively. *Id.* at 223. In the present case, the Board contends that the contested orders were not *ultra vires* and may be remedied. It further represents that "in conformance with the Court's holding, the Commissioner has already validated all outstanding 'emergency' redirection orders in conformance with the APA. *See N.J.A.C.* 7:26-6.5 (codification of redirection waste flow regulations.)"

It appears the regulation here, *N.J.A.C.* 7:26-6.5, was amended effective March 1, 1993, to update and simplify waste flow requirements for all counties. 25 *N.J.R.* 991 (March 1, 1993). This codification was in response to the opinion in *In re Certain Amendments,* 25 *N.J.R.* at 992. The agency explained that these rules, in place of the emergency redirection orders used under the former rules, would have retroactive application so there would be no violation of the APA's emergency rule-making procedures. *Ibid.* Although this action precedes the final

disposition in *In re Certain Amendments*, it is in accord with the Supreme Court's holding that the Commissioner could decide to adopt corrective measures to validate redirection orders. *In re Certain Amendments, supra,* 133 *N.J.* at 225. Thus, the redirection orders here are enforceable.

ISSUE V

Next appellants maintain that the sanctions and penalties imposed by the Commissioner were arbitrary, unreasonable and capricious, and should be set aside. We disagree.

An administrative agency has broad discretion in determining the sanctions to be imposed for violations of the legislation it is charged with administering. *In re Scioscia,* 216 *N.J. Super.* 644, 660 (App. Div.), *certif. denied,* 107 *N.J.* 652 (1987). Sanctions will be set aside on appeal only if found to be arbitrary, capricious, or unreasonable. *Ibid.* In *In re Polk License Revocation,* 90 *N.J.* 550 (1982), the Supreme Court said:

> In exercising this authority to alter a sanction imposed by an administrative agency, the Court can do so only when necessary to bring the agency's action into conformity with its delegated authority. The Court has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency. It can interpose its views only where it is satisfied that the agency has mistakenly exercised its discretion or misperceived its own statutory authority.

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> It has been stated that the test in reviewing administrative sanctions is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.' " *Pell v. Board of Education, Etc.*, 34 *N.Y.* 2d 222, 313 *N.E.*2d 321, 356 *N.Y.S.*2d 833, 841 (1974) (citation omitted). This test was specifically applied in the context of a proceeding to revoke a medical license in *DiMarsico v. Ambach*, 74 *App. Div.* 2d 960, 425 *N.Y.S.*2d 894, 895 (1980), in which the court said that unless the penalty shocked the conscience, it was "neither empowered nor inclined to substitute [its] judgment" for that of the Board.
>
> [*Id.* at 578.]

Neither the license revocation nor penalties imposed shock our conscience. Further, both the forfeiture and assessment of fines are based upon statutory-authority. *See N.J.S.A.* 48:13A-9 for license revocation and *N.J.S.A.* 48:13A-12(b) for monetary penalties.

ISSUE VI

Lastly, appellants claim that the emergency waste flow orders directing all solid waste to authorized transfer stations violate the Commerce Clause of the United States Constitution. *U.S. Const.* art. I, § 8, cl. 3. In making this argument, appellants rely chiefly on the recent United States Supreme Court case of *C & A Carbone, Inc. v. Clarkstown*, 511 *U.S.* ___, 114 *S. Ct.* 1677,

128 *L. Ed.* 2d 399 (1994). We note, however, that this constitutional issue was not raised below. This defect is fatal to appellants' argument. *See Deerfield Estates, Inc. v. East Brunswick Tp.*, 60 *N.J.* 115, 120 (1972) ("the general rule of appellate practice, that ordinarily no issue will be considered by the reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance"); *accord State v. Interest of A.J.*, 232 *N.J. Super.* 274, 293 (App. Div. 1989). It is well settled that "courts should not reach constitutional questions unless necessary to the disposition of the litigation." *O'Keefe v. Passaic Valley Water Comm'n*, 132 *N.J.* 234, 240 (1993). This principle, which has long been a part of our jurisprudence, still remains viable today. *Id.* at 241. The policy considerations underlying the avoidance of constitutional questions are a respect for other branches and levels of government, an awareness of the limitations of judicial power, sensitivity to the burdens of constitutional adjudication, and appreciation that others may provide a more useful answer. *Id.* at 241-42.

We are also swayed by the fact that the commerce clause issue is presently before Congress where several bills to permit states to enact flow control ordinances (S. 1634, H.R. 1357, H.R. 2649, H.R. 4074) are pending. In this respect, we again take note of the well settled fact that New Jersey's scheme for waste disposal was developed to cure a crisis caused by the shortage of adequate solid waste disposal facilities and inadequate regulation effecting the environment and economy. *A.A. Mastrangelo, Inc. v. Environmental Protection Dep't, supra* 90 *N.J.* at 670; *In re Fiorillo Bros. of N.J., supra*, 242 *N.J. Super.* at 682. For that reason, continued enforcement of the solid waste acts serves a significant and legitimate public purpose. *Matter of Felmeister*, 95 *N.J.* 431, 444 (1984):

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> Even when statutes have been held to be unconstitutional, enforcement thereafter during an interim period for good and sufficient reason is permissible. *See Salorio v. Glaser*, 93 *N.J.* 447, 467-68 (1983) (setting prospective effective date for enforcement of judgment invalidating Emergency Transportation Tax Act so that "[t]he State should be afforded a reasonable period of time to devise alternative * * * solutions"), *cert. denied*, __ *U.S.* __, 104 *S. Ct.* 486, 78 *L. Ed.* 2d 682 (1983), and cases cited therein.

One further observation is in order. If, in an appropriate setting, *Carbone* was determined to negate New Jersey's waste disposal program, we still would be left with the question of how that would impact on appellants' various fines and penalties. We conclude not at all. Traditionally, especially in criminal contexts, the rule was that "An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex Parte Siebold*, 100 *U.S.* 371, 25 *L. Ed.* 717, 719 (1879). *Accord Shuttlesworth v. Birmingham*, 394 *U.S.* 147, 151, 89 *S. Ct.* 935, 22 *L. Ed.* 2d 162, 167-68 (1969); *In Re Rose*, 122 *N.J.L.* 507, 509 (1939) (citing *Siebold*); *Kozlowski v. Kozlowski*, 80 *N.J.* 378, 386 (1979).

> This general rule, however, has been greatly modified, is not to be applied in all cases, is not absolutely or universally true, and there are various exceptions thereto. It has been stated that it is affected by other considerations, that a realistic approach has

> been eroding this doctrine, that such broad statements must be taken with qualification, that even an unconstitutional statute is an operative fact, at least prior to a determination of constitutionality, and may have consequences which cannot justly be ignored.
>
> [16 *C.J.S. Constitutional Law* § 108 (1984).]

In *Walker v. Birmingham*, 388 *U.S.* 307, 87 *S. Ct.* 1824, 18 *L. Ed.* 2d 1210, *reh'g denied*, 389 *U.S.* 894, 88 *S. Ct.* 12, 19 *L. Ed.* 2d 202 (1967), for example, the United States Supreme Court was faced with a situation in which demonstrators had purposely violated an injunction prohibiting mass street parades without a permit, on the basis that the permit ordinance was unconstitutional under the First Amendment. In state court, petitioners were found guilty for contempt and were sentenced to five days in jail and a $50 fine. After indicating that certain portions of the permit ordinance were constitutionally infirm, the Supreme Court nevertheless upheld the convictions, stating:

> The Supreme Court of Alabama, finding that the trial court had jurisdiction, applied the same rule of law which was followed here:
>
> "As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its

observance under an order or decree may disregard or violate the order or the decree with impunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree . . . ."

. . . .

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

[*Id.* 388 *U.S.* at 320-21 87 *S. Ct.* at 1831-32, 18 *L. Ed.* 2d at 1219-20.]

Our Supreme Court approvingly cited the *Walker* holding in *Felmeister, supra,* 95 *N.J.* at 445, where it disciplined two attorneys for violating the constitutionally infirm ban on radio and television advertising during the period in which the Court's

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Advertising Committee was preparing a report with recommendations for new advertising guidelines. As in *Walker,* the Court was very concerned that respondents had purposely violated the ban without seeking a declaratory judgment. *Ibid.* Accordingly, the Court held that the ban's unconstitutionality was not a defense to the discipline imposed. *Id.* at 444-47.

In this case, appellants, with knowledge of the waste flow orders, deliberately ignored those orders and new rate increases. The ALJ and Commissioner found this conduct intentional and thus a very serious violation of New Jersey's solid waste management system. We, therefore, additionally conclude that under the circumstances of this case, appellants cannot shield themselves from liability for their deliberately contumacious acts by raising the defense that the flow control orders at issue are unconstitutional under *Carbone.*

The decision of the Commissioner is — in all respects — affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
s/ Emille R. Cox
Clerk

APPENDIX E — RELEVANT STATUTES

7:26-6.1 Authority

This subchapter is promulgated pursuant to the policies set forth in and the authority delegated to the Department of Environmental Protection by the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. and to the Board of Public Utilities (BPU) pursuant to the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq.

7:26-6.2 Purpose

The New Jersey Department of Environmental Protection and Energy has reviewed and approved the adopted solid waste management plans for all 22 of the solid waste management districts in New Jersey. Based on these plans, it is evident that interdistrict solutions to planning issues through regional cooperation are required. Further, the Department has determined that the public interest requires the designation of in-State specific disposal facilities to serve as the ultimate destination facility of certain waste streams. This subchapter shall set forth the designations by the Department of intradistrict and interdistrict waste flows, designated specific facilities to serve specific geographic areas. This subchapter shall also set forth the policy for the flow of solid waste prior to receipt at the ultimate designated facility.

Amended by R.1993 d.508, effective October 18, 1993. See: 24 N.J.R. 3286(c), 25 N.J.R. 4763(a).

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7:26-6.5 District waste flow planning requirements and disposal facility designations

* * *

(b) Waste flows within, into and out of the Bergen County District:

1. Two hundred and fifty thousand (250,000) tons per year of processible solid waste types 10 and 23 generated from within Bergen county and processed at the Sal-Car Transfer Station, facility number 02267b, located in Hillsdale Boro, Bergen County, the DiBella Transfer Station, facility number 0247B, located in Park Ridge Boro, Bergen County, the National Transfer Station, facility number 0231A, located in Lodi Boro, Bergen County, the Garofalo Transfer Station, facility number 0221A, located in Garfield City, Bergen County, and the United Carting Transfer Station, facility number 0218A, located in Fairview Boro, Bergen County, shall be transported directly to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey. (Effective May 1, 1991).

i. All residual ash generated from the operation of the Essex County RRF shall be disposed of by the Bergen County Utilities Authority (BCUA consistent with the agreement between the BCUA and Essex County and in compliance with the Essex County RRF facility permit at permitted and approved out-of-State landfill facilities. (Effective May 1, 1991).

ii. Bypass waste and nonprocessible waste

generated from the operation of the Essex County RRF shall be disposed of consistent with the agreement between the BCUA and Essex County and in accordance with the provisions of the approved Essex County District Solid Waste Management Plan. (Effective May 1, 1991).

2. At the request of Essex County, processible solid waste types 10 and 23 generated within Bergen County in an amount not to exceed 1,600 tons per week in 1992, 2,000 tons per week from January 4, 1993 through February 28,1993, and 1,700 tons per week from March 1, 1993 through July 31, 1993 shall be transported to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, New Jersey, on an as needed basis from one of the transfer stations set forth in (b)1 above or (b)4 below.

3. Except as may be required by the terms of (b)2 above, to the extent that the five private transfer stations set forth in (b)1 above process tonnages in excess of the 250,000 tons noted above, all excess processible solid waste types 10, 13, 23, 25 and 27 shall be directed form each individual transfer station to an approved out-of-State disposal facility as provided in the Bergen County Plan. (Effective May 19, 1992).

* * *

(g) Waste flows within, into and out of the Essex County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated

from within the Essex County municipalities of Irvington, Livingston, Maplewood, Millburn, and South Orange are hereby directed to the Waste Management of New Jersey Transfer Station, located at 100 Avenue A, in the City of Newark, Essex County, New Jersey.

2. All solid waste types 10, 23, and 27 generated from within the Essex County municipality of Newark are hereby directed to the Waste Management of New Jersey Transfer Station, located at 100 Avenue A, in the City of Newark, Essex County, New Jersey.

3. All solid waste types 10, 13, 23, 25, and 27 generated from within the Essex County municipalities of Belleville, Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange are hereby directed to the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at 442 Frelinghuysen Avenue, in the City of Newark, Essex County, New Jersey.

4. All solid waste type 13 generated from within the Essex County municipality of Newark is hereby directed to the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at 442 Frelinghuysen Avenue, in the City of Newark, Essex County. New Jersey.

5. Upon commencement of operations of the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at Hill Street, in the City of Orange. Essex County, New Jersey, all solid waste types 10, 23, 25, and 27 generated from within the Essex County municipalities of Belleville,

Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange shall be directed to this facility.

6. All solid waste types 10, 23, and 27 generated within the municipalities of Belleville, Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Irvington, Livingston, Maplewood, Millburn, Montclair, Newark, North Caldwell, Nutley, Orange, Roseland, South Orange, Verona, West Caldwell, and West Orange is directed to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey.

i. All waste types 13, 25 and nonprocessible type 27 from the municipalities listed in (g)6 above, shall be disposed of at approved out-of-state facilities in accordance with the laws and regulations of the receiving state. Out-of-State disposal shall be via the Solid Waste Transfer and Recycling. Inc., Transfer Station, located in Newark, Essex County, New Jersey.

7. Two hundred and fifty thousand (250,000) tons per year of processible solid waste types 10 and 23 generated from within Bergen County and processed at the transfer stations listed in (b)1 above shall be directed to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey. (Effective May 1, 1991). In addition, at the request of Essex County, processible solid waste types 10 and 23 generated within Bergen County in an amount not to exceed 1,600 tons per week in 1992, 2,000 tons per week from January 4, 1993

through February 28, 1993, and 1,700 tons per week from March 1, 1993 through July 31, 1993 shall be transported to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark. New Jersey, on an as needed basis from one of the transfer stations set forth in (b)1 and 4 above.

i. All residual ash generated from the operation of the Essex County RRF shall be disposed of by the BCUA consistent with the agreement between the BCUA and Essex County and in compliance with the Essex County RRF facility permit at permitted and approved out-of-State landfill facilities. (Effective May 1, 1991).

ii. Bypass waste and nonprocessible waste generated from the operation of the Essex County RRF shall be disposed of consistent with the agreement between the BCUA and Essex County and in accordance with the provisions of the approved Essex County District Solid Waste Management Plan. (Effective May 1, 1991).

* * *

(i) Waste flows within, into and out of the Hackensack Meadowlands District:

1. The Hackensack Meadowlands Development Commission shall accept certain waste flows from Bergen and Hudson Counties as described in (b) above and (j) below.

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(j) Waste flows within, into and out of the Hudson County District:

1. All waste types 13. 23, 25, and 27 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York town shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North Arlington, Bergen County, New Jersey for handling prior to transportation to out-of-State permitted disposal facilities in accordance with the laws and regulations of the receiving state. (Effective February 4, 1991).

2. All waste type 10 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York Town shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North Arlington, Bergen County, New Jersey, for baling prior to disposal at the Hackensack Meadowlands Development Commission 1-E landfill, facility number 0907W, located in North Arlington, Bergen County, New Jersey. (Effective February 4, 1991).

3. Upon closure of the HMDC 1-E landfill, all waste type 10 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey

City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York Town shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North Arlington, Bergen County, New Jersey for handling prior to transportation to out-of-State permitted disposal facilities in accordance with the laws and regulations of the receiving state. (Effective February 4, 1991).

* * *

(m) Waste flows within, into and out of the Middlesex County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within all municipalities in Middlesex County shall be disposed of at the Middlesex County Utilities Authority Landfill (Edgeboro), facility number 1204A, located in East Brunswick, Middlesex County, New Jersey. (Effective July 19, 1990).

* * *

(*o*) Waste flows within, into and out of the Morris County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within the Morris County municipalities of Chester Borough, Chester Township, Dover, Jefferson, Mendham Borough, Mendham Township, Mine Hill, Mount Arlington, Mount Olive, Netcong, Randolph, Rockaway Borough, Rockaway Township, Roxbury, Victory Gardens,

Washington, and Wharton shall be directed to the Morris County Transfer Station, facility number 1427F, located in Mount Olive Township. Morris County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

2. All solid waste types 10, 13, 23, 25, and 27 generated from within the Morris County municipalities of Boonton Borough, Boonton Township, Butler, Chatham Borough, Chatham Township, Denville, East Hanover, Florham Park, Hanover, Harding, Kinnelon, Lincoln Park, Madison, Montville, Morris Plains, Morris Township, Morristown, Mountain Lakes, Parsippany-Troy Hills, Passaic, Pequannock, and Riverdale shall be directed to the Morris County Transfer Station, facility number 1429J, located in Parsippany-Troy Hills Township, Morris County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

* * *

(q) Waste flows within, into and out of the Passaic County District:

1. All solid waste types 10 (except medical wastes), 13 (except large bulky wastes including such items as cable larger than six feet, foam insulation, tires, etc.). 23 (except leaves), 25, and 27 (except dry industrial waste such as plastics, rags, bulk powders, and containers with tar and paint residues, etc.) generated from within the Passaic County municipalities of Haledon, Hawthorne, North

Haledon, Passaic City, Prospect Park, and Paterson shall be directed to the Pen Pac, Inc., Fulton Street Transfer Station, facility number 1608H, located in the City of Paterson, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state. (Effective January 23, 1989).

2. Upon issuance of all required departmental permits, all solid waste types 10 (except medical wastes), 13 (except large bulky wastes including such items as cable larger than six feet, foam insulation, tires, etc.), 23 (except leaves), 25, and 27 (except dry industrial waste such as plastics, rags, bulk powders, and containers with tar and paint residues, etc.) generated from within the Passaic County municipalities of Bloomingdale, Clifton, Little Falls, Pompton Lakes, Ringwood, Totowa, Wanaque, Wayne, West Milford, and West Paterson shall be directed to the Pen Pac, Inc., Totowa Transfer Station, facility number 1612B, located in Totowa Borough, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

3. Only solid waste types 10, 13, and 27, which are prohibited from the Fulton Street and Totowa Transfer Stations as indicated in (q)1 and 2 above, generated from all Passaic County municipalities shall be directed to Pen Pac. Inc., Iowa Avenue Transfer Station, facility number 1608A, located in the City of Paterson, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

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7:26-6.6 Procedure for modification of waste flows pursuant to an amendment to a District Solid Waste Management Plan

(a) This section shall govern the procedures to be followed in the event that a Board of Chosen Freeholders or the Hackensack Commission adopts a plan amendment, in accordance with N.J.S.A. 13:1E-23, which provides for the modification of existing waste flows.

* * *

7:6-6.7 Procedure for emergency direction or redirection of solid waste flow

(a) Upon a determination by the Department that an emergency condition, including, but not limited to the unanticipated closure of a disposal facility or restricted access thereto, requires the redirection of waste flows, the Department may, after approval by the Board, order such redirection.

(b) The Department shall, within 20 days of such redirection, determine the likely duration of the redirection.

1. If the expected duration is 90 days or less, the Department's redirection shall remain in effect.

2. If the expected duration is greater than 90 days but not more than 180 days, the Department and the Board shall, by public notice, request written comment for a 30-day period. The Department and the Board may modify such waste flow redirections on the basis of comments received.

Appendix E

3. If the expected duration is greater than 180 days, the Department shall order the affected districts to submit a plan amendment which provides for the modification of existing waste flows.

(2)

Supreme Court, U.S.
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No. 95-1283

In The

Supreme Court of the United States

October Term, 1995

JERSEY CARTING, INC., ANGELA MORIANO AND MARIO MORIANO,

Petitioners,

v.

BOARD OF REGULATORY COMMISSIONERS,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioners are asking this Court to review an intermediate state court appellate decision which: (1) affirmed an administrative decision to deny petitioners a stay of an administrative proceeding pending the outcome of a separate and independent criminal proceeding against petitioners; and (2) rejected petitioners' Commerce Clause challenge to the State of New Jersey's solid waste regulatory system on the grounds that petitioners failed to raise this issue below at the administrative hearing.

The counter-statement of questions presented is as follows:

1. Whether an intermediate state court appellate decision affirming the denial of a stay of an administrative proceeding pending the outcome of a criminal proceeding presents a question of public importance?

2. Whether an intermediate state court appellate decision affirming the imposition of sanctions and penalties against petitioners for violating New Jersey's solid waste regulatory laws rests on adequate non-federal grounds?

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COUNTER-STATEMENT OF THE CASE

Since this Court's decision in *City of Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978), the State of New Jersey ("State") has continued to grapple with its solid waste crisis. Petitioners' business practices in violation of New Jersey's regulatory system have contributed to this crisis. Based upon findings of an independent administrative law judge ("ALJ") following a seven-day plenary hearing, the State of New Jersey has determined that petitioners are not qualified to be licensed in the State's solid waste industry.

This case arose out of the State of New Jersey's enforcement action against Jersey Carting, Inc., a New Jersey licensed solid waste hauler, and its owners, Angela and Mario Moriano, (collectively "petitioners") as a result of petitioners' illegal and deliberate disregard of New Jersey's solid waste utility regulatory laws. Following a thorough investigation, the Board of Public Utilities ("Board") charged petitioners with unlawfully disposing of 102 truckload containers of solid waste at unauthorized New Jersey sites in violation of waste flow orders and committing 84 tariff violations. (Pet. App. 70a) The matters were transferred to the New Jersey Office of Administrative Law for a full evidentiary hearing.

Exactly one week before the evidentiary hearing was to commence, petitioners filed a motion arguing that the Fifth Amendment Double Jeopardy Clause of the United States Constitution warranted a dismissal of the administrative hearing or, alternatively, a stay of the administrative hearing pending the outcome of a criminal proceeding which charged petitioners with theft by

deception. Issued more than one and one-half years after the Board's case, the theft by deception indictment charged petitioners with unlawfully obtaining money from two garbage customers by creating and reinforcing the false impression that their customers' garbage was being disposed of at authorized disposal facilities. (Pet. App. 74a) Contrary to petitioners' assertion, the criminal indictment and the Board's case did not involve "identical issues of fact" (Pet. 4) nor were the criminal and administrative proceedings "interrelated." (Pet. 7) First, the criminal charge was far narrower in scope than the Board's charges of petitioners' widespread violations of the State of New Jersey solid waste regulatory laws. Secondly, while the administrative proceeding sought monetary penalties, more importantly, the Board sought to delicense and debar petitioners from the solid waste industry because of their pattern and practice of violating the State's solid waste laws. (Pet. App. 74a-75a)

A plenary hearing was held over the course of seven days. On the first day of hearing, the ALJ denied petitioners' motion to dismiss and alternatively their request for a stay of the administrative proceeding, rejecting petitioners' double jeopardy arguments.[1] The Board then called eight witnesses; two of those witnesses were petitioners Angela and Mario Moriano. When called to the witness stand, Angela and Mario Moriano, on the advice of their counsel, exercised their Fifth Amendment rights refusing to respond to any of the Board's questions. Petitioners cross-examined the Board's other witnesses but

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[1] Petitioners did not seek interlocutory review of the ALJ's denial of a stay.

did not call any witnesses on their own behalf. (Pet. App. 72a)

Following the administrative hearing, the ALJ issued her decision, finding that petitioners had flagrantly violated the Board's waste flow orders and certain Board customer billing orders in violation of the New Jersey Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-1 *et seq.*, and the New Jersey Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* Because of the seriousness of the violations and the egregiousness of petitioners' illegal conduct, the ALJ recommended the revocation of Jersey Carting's license to engage in the solid waste industry and the permanent debarment of Angela and Mario Moriano from the solid waste industry. The Commissioner of the Department of Environmental Protection (which superseded the Board's jurisdiction) affirmed and modified the ALJ's recommendation to include the finding that petitioners had also committed tariff violations.[2] (Pet. App. 73a and 87a)

On appeal to the Superior Court of New Jersey, Appellate Division ("Appellate Division"), petitioners raised, among other issues, the two questions now presented before this Court: (1) whether the ALJ abused her discretion in denying petitioners' request for a stay of the administrative proceeding pending the outcome of the criminal proceeding; and (2) whether the State of New Jersey's solid waste regulatory system was violative of

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[2] The Commissioner of the Department of Environmental Protection granted petitioners' motion to stay enforcement of the agency's final order while the matter was pending in the Appellate Division.

the Commerce Clause of the United States Constitution. The Appellate Division addressed both these issues.

In rejecting the first contention, the Appellate Division relied upon well-established principles set forth in the New Jersey Supreme Court decision in *State v. Kobrin, Inc.*, 111 *N.J.* 307, 544 *A.*2d 833 (1988) and this Court's decision in *United States v. Kordel*, 397 *U.S.* 1 (1970). (Pet. App. 73a-75a) First, recognizing that petitioners had "concede[d] that the underlying administrative proceeding was broader than the concurrent criminal action," (Pet. App. 74a), the Appellate Division ruled that petitioners had failed to carry their burden of demonstrating how their rights outweighed the public interest. (Pet. App. 73a) Relying upon *Kobrin*, the Appellate Division reasoned that the State of New Jersey's public interest in preventing illegal dumping substantially outweighed petitioners' interest in staying the administrative proceeding. Moreover, the Appellate Division found that because "the public interest in enforcing a comprehensive effort to deal with New Jersey's solid waste disposal crisis was strong and substantial and the scope of the criminal case limited in comparison to the civil proceeding, . . . it was not fundamentally unfair to require [petitioners] to participate in the administrative proceedings." (Pet. App. 75a)

The Appellate Division also rejected the Commerce Clause challenge to New Jersey's solid waste regulatory system on the ground that "this constitutional issue was not raised below." (Pet. App. 83a) Relying upon State law and well-established rules of appellate practice, which require the presentation of any and all legal challenges at the hearing, the Appellate Division ruled that petitioners'

failure to raise the constitutionality of New Jersey's waste management system at any stage of the administrative proceeding was a fatal defect. (Pet. App. 82a-83a) The Appellate Division further opined that even if petitioners had properly raised the issue, it would have concluded that petitioners' argument was without merit. (Pet. App. 84a-86a)

Finally, the Appellate Division affirmed the ALJ and Commissioner's decisions ordering the revocation of Jersey Carting's solid waste license, the debarment of petitioners Angela and Mario Moriano from the solid waste industry, and the payment of a $186,000 fine. The Appellate Court found that the Board had conducted a "thorough and extensive investigation of [petitioners'] actual waste disposal reveal[ing] widespread and continued disregard of [waste flow] orders" and that petitioners' illegal conduct was "intentional" and "contumacious" and a "very serious violation of New Jersey's solid waste management system." (Pet. App. 72a and 87a)

On November 14, 1995, the New Jersey Supreme Court denied petitioners' petition for certification which raised, among other issues, the same two issues now presented to this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO DEMONSTRATE THAT THE DENIAL OF A STAY OF AN ADMINISTRATIVE PROCEEDING PENDING THE OUTCOME OF A CRIMINAL PROCEEDING PRESENTS A QUESTION OF PUBLIC IMPORTANCE OR WHETHER THE DECISION TO DO SO IS IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Petitioners principally claim that this Court should grant the writ of certiorari because the "analysis [of the Appellate Division decision] was incorrect and [that] a stay of the civil proceeding should have been granted pending the resolution of the criminal matter." (Pet. 12) This amorphous argument does not raise a question of public importance nor does it require this Court to resolve any unsettled or conflicting decisions of this Court or any other court. The Petition should therefore be denied.

Contrary to petitioners' claim, the decision of the Appellate Division affirming the denial of a stay rests on well-established New Jersey state law as well as federal case law which is wholly consistent with the protections guaranteed by the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right to due process of law. In the decision below, the Appellate Division upheld the denial of the stay by relying upon the New Jersey Supreme Court's decision in *Kobrin, supra,* 111 *N.J.* 307, 544 *A.*2d 833. *Kobrin* establishes the criteria for determining whether to grant a stay when there are concurrent civil and criminal charges pending against an individual. Under *Kobrin*'s analysis, a trial or

an administrative judge must determine: (1) whether in the civil proceeding the government seeks only a monetary penalty against the defendant; (2) whether the two actions are nearly identical in scope; (3) whether the relief sought in the civil proceeding is intended to prevent continued injury to the public; and (4) whether continuation of the civil proceeding would expose a litigant to undue risk of losing the civil case or facing criminal prosecution. *Id.* at 313-15, 544 *A.*2d at 836-837.

The *Kobrin* standard for determining whether to grant a stay of a civil proceeding pending the outcome of a criminal proceeding is wholly consistent with a general body of federal case law. In fact, the principles articulated by the New Jersey Supreme Court in *Kobrin* are identical with those established by decisions of this Court and other federal courts. *See Kobrin, supra,* 111 *N.J.* at 312-317, 544 *A.*2d at 836-838 (citing among other federal cases *United States v. Kordel,* 397 *U.S.* 1 (1970) and *Sec. and Exch. Comm'n v. Dresser Indus.,* 628 *F.*2d 1368 (D.C. Cir. 1980) (*en banc*), *cert. denied,* 449 *U.S.* 993 (1980)). These principles as articulated by the New Jersey Supreme Court and by this Court serve to protect the fundamental constitutional guarantees of due process and the proper administration of justice. *Kordel, supra,* 397 *U.S.* at 11.

In *Kobrin,* the New Jersey Supreme Court, consistent with *Kordel,* recognized as a general matter that the government is free to pursue both civil and criminal remedies without infringing on the constitutional rights of defendants. *Kobrin,* 111 *N.J.* at 312-313, 544 *A.*2d at 835-836. Relying on this Court's guidance, the New Jersey Supreme Court explained:

> The conflict of interest resulting from the interrelationship of criminal and civil actions against the same defendant is a familiar one. In *DeVita v. Sills*, 422 *F.*2d 1172 (3d Cir. 1970), [the Third Circuit] explored the tensions inherent in such proceedings and noted that whatever the difficulties of invoking the fifth-amendment privilege, *there is no constitutional inhibition that a defendant in a criminal case not "be put to the difficult choice of having to assert the privilege in a related case * * * ." Id.* at 1178 (citing *United States v. Kordel*, 397 *U.S.* 1, 90 *S.Ct.* 763, 25 *L.Ed.*2d 1 (1970)).
>
> [*Kobrin*, 111 *N.J.* at 312-313, 544 *A.*2d at 835-836 (emphasis added)]

The focus of the *Kobrin* analysis is whether a denial of a stay "would impose undue hardship on a defendant and would thereby expose . . . the defendant exercising the constitutional privilege" to unnecessary adverse consequences. *Kobrin*, 111 *N.J.* at 314, 544 *A.*2d at 836.

The analysis underlying the New Jersey Supreme Court decision in *Kobrin* rests principally upon *Kordel* and its progeny. In *Kordel*, this Court found no constitutional infringement in allowing discovery to proceed in a civil action involving violations of the federal Food, Drug, and Cosmetic Act, despite the pendency of a criminal investigation involving the same conduct. This Court stressed that the public interest in protecting consumers from mislabeled drugs required prompt civil action by the agency charged with enforcing the food and drug laws, and that such action should not await the resolution of pending criminal proceedings. This Court reasoned: "It would stultify enforcement of federal law to require a

government agency . . . to choose either to forego recommendation of criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11. "[W]e cannot agree that the respondents have made out either a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power." *Id.*

Just as this Court emphasized in *Kordel*, the New Jersey Supreme Court in *Kobrin* recognized that "there is no constitutional inhibition that a defendant in a criminal case not 'be put to the difficult choice of having to assert the privilege in a related civil case.' " *Kobrin*, 111 *N.J.* at 312-313, 544 *A.*2d at 835-836 (citing *United States v. Kordel, supra*, 397 *U.S.* 1). Moreover, consistent with this Court's ruling in *Kordel*, the New Jersey Supreme Court equally stressed that "when relief is sought to prevent continued injury to the public . . . , the civil proceedings should not be stayed except in the most unusual circumstances." *Kobrin*, 111 *N.J.* at 314, 544 *A.*2d at 837 (citing *United States v. Kordel, supra*, 397 *U.S.* 1). Most importantly, both *Kordel* and *Kobrin* clearly state: "If the defendants are unqualified to serve in [their] profession . . . the licensure proceedings against them cannot be stayed." *Id.* at 315, 544 *A.*2d at 837; *accord Kordel*, 397 *U.S.* at 11.

Contrary to petitioner's claim, the New Jersey Supreme Court decision in *Kobrin* is consistent with *Kordel* but also the decision by the Court of Appeals for the District of Columbia in *Securities & Exch. Comm'n v. Dresser Indus., supra*, 628 F.2d 1368. In *Dresser*, the District of Columbia Court of Appeals, like the New Jersey

Supreme Court in *Kobrin*, relied on this Court's decision in *Kordel* in articulating factors which would guide the Circuit Court's consideration for determining whether to stay a civil proceeding pending the outcome of a parallel criminal proceeding:

> The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *See Baxter v. Palmigiano*, 425 *U.S.* 308, 98 *S.Ct.* 1551, 47 *L.Ed.*2d 810 (1976); *DeVita v. Sills*, 422 *F.*2d 1172, 1181 (3d Cir. 1970). Nevertheless, a court may decide in its discretion to stay civil proceedings . . . "when the interests of justice seem[] to require such action. . . . " *United States v. Kordel, supra*, 397 *U.S.* at 12 n.27, 90 *S.Ct.* at 770. . . . The court must make such determinations in the light of the particular circumstances of the case.
>
> Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.
>
> [*Dresser*, 628 *F.*2d at 1376-77 (citations omitted)]

There simply is no fundamental difference between the analysis set forth in *Dresser* and that in *Kobrin*. In fact, *Kobrin* places significant reliance upon *Dresser* in its analysis of whether to stay a civil proceeding pending the outcome of a parallel criminal proceeding. *See Kobrin*, 111 *N.J.* at 314-317, 544 *A.*2d at 836-837 (whether the civil proceeding seeks only a monetary recovery, citing *Dresser*, 628 *F.*2d at 1375); (whether the two actions are

identical in scope, citing *Dresser*, 628 F.2d at 1376); (whether deferring the criminal action outweighs the public interest, citing *Dresser*, 628 F.2d at 316-317).

Moreover, since this Court's announcement in *Kordel* more than twenty-five years ago, a myriad of federal courts have articulated similar standards for determining whether to stay civil proceedings pending the outcome of parallel criminal proceedings. *See, e.g., SEC v. First Financial Group of Texas*, 659 F.2d 660, 666 (5th Cir. 1981) ("The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions."); *DeVita v. Sills, supra*, 422 F.2d 1172 (the 3d Cir., quoting *Kordel*, ruled that there is no constitutional inhibition that a defendant in a criminal case not "be put to the difficult choice of having to assert the privilege in a related civil case"); *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970) ("fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter"); *Paine, Weber, Jackson & Curtis, Inc. v. Andrus, Inc.*, 486 *F. Supp.* 1118, 1119 (S.D.N.Y. 1980) ("That defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff from expeditiously advancing its claim.").

Thus, an examination of federal case law, including this Court's decision in *Kordel*, reveals that the New Jersey Supreme Court's decision in *Kobrin* promotes the fundamental protections guaranteed by the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right of due process of law. In the

decision below, the Appellate Division carefully and thoroughly weighed the inherent conflict of interests resulting from petitioners' assertion of their Fifth Amendment right against self-incrimination and the State of New Jersey's substantial and strong interest in the proper disposal of solid waste in the context of New Jersey's solid waste crisis. (Pet. App. 73a-75a) Thus, petitioners do not now present any question of public importance nor do they demonstrate that the decision below is in conflict with any decision of this Court, or any other federal or state court.

Petitioners also have failed to demonstrate that the state appellate court's "analysis was incorrect." (Pet. 12) In fact, petitioners fail to cite to anything beyond their blanket assertion that under a proper analysis "a stay of the civil proceeding should have been granted pending the resolution of the criminal matter." (Pet. 12) The Appellate Division, consistent with the teachings of *Kobrin*, ruled that petitioners "had the burden to demonstrate how their rights outweighed the public interest." (Pet. App. 75a) Petitioners failed to do so. As the Appellate Division emphasized:

> The public interest in enforcing a comprehensive effort to deal with [the solid waste] crisis is strong and is weakened by illegal dumping which destabilizes the economy and creates a health hazard. Since the public interest in preventing illegal dumping was substantial and the scope of the criminal case limited in comparison to the civil proceeding, . . . it was not fundamentally unfair to require appellants to participate in the administrative proceedings.
>
> [Pet. App. 75a (citations omitted)]

II. THE STATE APPELLATE DECISION REJECTING PETITIONERS' COMMERCE CLAUSE CHALLENGE TO NEW JERSEY'S WASTE MANAGEMENT SYSTEM RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND THEREFORE DOES NOT PRESENT A QUESTION OF PUBLIC IMPORTANCE OR SIGNAL A CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Petitioners also claim that the Appellate Division improperly dismissed their constitutional challenge to the State of New Jersey's solid waste regulatory laws. (Pet. 13-14) In raising this claim, however, petitioners again fail to address whether this particular issue raises a question of public importance or whether the issue signals a conflict between any decision by this Court or any other federal or state court. Significantly, petitioners fail to mention that the Appellate Division dismissed petitioners' claim on non-federal grounds; thus, that court ruled:

> [T]his constitutional issue was not raised below. This defect is fatal to appellants' argument. *See Deerfield Estates, Inc. v. East Brunswick Tp. N.J.*, 115, 120 (1972) ("the general rule of appellate practice, that ordinarily no issue will be considered by the reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance"); *accord State v. Interest of A.J.*, 232 *N.J. Super.* 274, 293 (App. Div. 1989). It is well-settled that "Courts should not reach constitutional questions unless necessary to the disposition of the

litigation." *O'Keefe v. Passaic Valley Water Comm'n*, 132 *N.J.* 234, 240 (1993).

[Pet. App. 83a]

This Court provided the standard for determining whether a state court opinion rests on adequate and independent state grounds in *Michigan v. Long*, 463 *U.S.* 1032 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. Because the state court decision at issue here expressly rests on independent and adequate state grounds, this Court should reject petitioners' argument that the state court improperly failed to consider petitioners' constitutional challenge to New Jersey's waste management system.

Although the Appellate Division dismissed petitioners' Commerce Clause argument on adequate and independent state grounds, petitioners claim that the Appellate Division "erred in failing to consider Petitioners' challenges to the New Jersey waste flow control scheme as being violative of the Commerce Clause." (Pet. 15) Petitioners' argument is predicated on this Court's decision in *C. & A Carbone v. Town of Clarkstown*, ___ *U.S.* ___, 114 *S.Ct.* 1677 (1994), in which the Court found unconstitutional a New York municipal waste flow ordinance that directed the flow and disposal of a municipality's solid waste. The Court invalidated the local ordinance on the ground that the ordinance unreasonably interfered with interstate commerce. *Carbone, supra*, ___ *U.S.* at ___, 114 *S.Ct.* at 1683-84. Petitioners' argument, however, should be summarily rejected because it

assumes that *Carbone*, in declaring a municipal ordinance unconstitutional, also impliedly and correspondingly declared New Jersey's state-wide waste management system unconstitutional. Apart from the fact that this issue is still being litigated, *see Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995), *remanded*, 893 *F. Supp.* 301 (D.C.N.J. 1995), that was not *Carbone's* mandate. "The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference." *Borough of Glassboro v. Gloucester County Board Of Chosen Freeholders*, 100 *N.J.* 134, 147, 495 *A.*2d 49, 56, *cert. denied*, 474 *U.S.* 1008 (1985). In *Carbone*, this Court invalidated a single New York municipal waste flow ordinance and did so with the benefit of a full record to decide that matter, explaining that:

> Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, *save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny*, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 *U.S.* 1 (1986).
>
> [*Carbone, supra*, ___ *U.S.* at ___, 114 *S.Ct.* at 1683 (emphasis added).]

Petitioners' failure to raise this issue in a timely fashion below precluded development of the type of record this Court requires for review of Commerce Clause issues. "Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation." *Gospel Army v. City of Los Angeles*, 331 *U.S.* 543, 548 (1947). Thus, the appellate court was not in a position to

apply *Carbone* to the State of New Jersey's entire regulatory system. As this Court has noted, "It is settled beyond controversy that a decision of this Court on appeal, as [to] a matter of fact, does not become the law of the case." *Gospel Army, supra,* 331 *U.S.* at 548 (internal quotation omitted).

Moreover, at the time that the Appellate Division rendered its decision, there had been no ruling by any state or federal court that New Jersey's solid waste management system was in any way unconstitutional. Indeed, as of the date of the Appellate Division's ruling, the controlling case in the Third Circuit specifically upheld the constitutionality of New Jersey's solid waste management system under Commerce Clause analysis. *J. Filiberto Sanitation v. Dep't of Environmental Protection,* 857 *F.*2d 913 (3d Cir. 1988). Besides *Filiberto,* other New Jersey cases have upheld the constitutionality of New Jersey's waste management system. *See In re Fiorillo Bros.,* 242 *N.J. Super.* 667, 577 *A.*2d 1316, (App. Div.), *certif. denied,* 122 *N.J.* 363, 585 *A.*2d 371 (1990); *In re Waste Disposal Agreement,* 237 *N.J. Super.* 516, 568 *A.*2d 547 (App. Div.), *certif. denied,* 121 *N.J.* 647, 583 *A.*2d 337 (1990).

Only in the wake of *Carbone* has the constitutionality of New Jersey's waste flow regulations been put into question. Although overruling *Filiberto* in *Atlantic Coast,* the Third Circuit did not find New Jersey's waste flow regulations unconstitutional. *Atlantic Coast, supra,* 48 *F.*3d at 718-719. Instead, in considering this Court's decision in *Carbone,* the Third Circuit remanded the case to the district court for a fact-finding determination of whether New Jersey waste flow could meet the heightened scrutiny required by *Carbone. Atlantic Coast, supra,* 48 *F.*3d

701. The pending litigation in *Atlantic Coast* attests to the fact that the Appellate Division was not in a position to apply *Carbone* to New Jersey's regulatory system at the time the Appellate Division had rendered its decision. Thus, as *Atlantic Coast* demonstrates, this Court's decision in *Carbone* did not change the basic analytical framework within which the lower courts are to review laws that allegedly violate the Commerce Clause; needless to say, this analytical framework depends heavily on an analysis of the specific purposes and effects of each law. *See also West Lynn Creamery, Inc. v. Healy*, ___ *U.S.* ___, ___, 114 *S.Ct.* 2205, 2215 (1994) (Commerce Clause analysis guided by "sensitive, case-by-case analysis of purposes and effects" of challenged legislation).

Given that the state appellate court did not have a record before it to decide such a fact-sensitive question, it would not have been appropriate nor prudent for the Appellate Division to simply read *Carbone* as automatically mandating the invalidation of the comprehensive solid waste utility management system in New Jersey based on the mere commonality of the words "waste flow." Yet, that is what petitioners desire. Petitioners argue, "In *Carbone*, this Court held a similar waste flow control ordinance was discriminatory against interstate commerce." (Pet. 14) However, in making this argument, petitioners erroneously describe New Jersey's state-wide solid management system as "a similar waste flow control ordinance" to a single New York waste flow ordinance. Nothing could be more misleading than this assertion. As previously noted, the complexity of New Jersey's system of waste management is well-documented and is currently under review. *See, e.g., Atlantic Coast,*

supra, 48 F.3d at 704-708 ("New Jersey has an extensive statutory and regulatory system governing the management and disposal of solid waste.") Second, petitioners' argument is based on a speculative theory that *Carbone* sounded the death knell to New Jersey's waste management system. That was not the case when this Court rendered its decision in *Carbone*, and it certainly was not the case when the state appellate court rejected petitioners' argument.

III. THE STATE COURT AFFIRMANCE OF THE PENALTIES AND SANCTIONS IMPOSED UPON PETITIONERS CONCERNS A DISPUTE BETWEEN THE STATE OF NEW JERSEY AND PETITIONERS AND THEREFORE DOES NOT PRESENT ANY QUESTION OF PUBLIC IMPORTANCE OR GIVE RISE TO ANY CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Finally, petitioners claim that the State court "erred in declaring that *even if* the New Jersey waste flow scheme is found to be *per se* invalid," the penalties and sanctions imposed upon petitioners would remain enforceable. (Pet. 15) (emphasis added) This final argument should be dismissed by this Court because, regardless of whether there is any merit to the argument, it is not ripe for review. Under the Court's ripeness doctrine, it has been well-settled that in accordance with the Court's policy of self-restraint, this Court will not decide cases "in advance of the necessity of deciding them." *Rescue Army v. Municipal Court of Los Angeles*, 333 *U.S.* 549, 568-569 (1947). On its face, the premise of petitioners'

argument -- "even if the New Jersey waste flow system is found to be per se invalid" -- is highly speculative and does not present any case or controversy ripe for review.

Petitioners' argument is a challenge to nothing more than dictum in the State Court decision. The appellate court simply observed that "[i]f, in an appropriate setting, *Carbone* was determined to negate New Jersey's waste disposal program," *Carbone* would not impact petitioners' sanctions and penalties. (Pet. App. 84a-85a) In making this observation, the Appellate Division, quoting this Court's decision in *Walker v. Alabama*, 388 *U.S.* 307, *reh'g denied*, 389 *U.S.* 894 (1967), ruled that "an unconstitutional statute . . . may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially *declared in appropriate proceedings.*" *Id.* at 320-321 (emphasis added);[3] *see also In re Felmeister*, 95 *N.J.* 431, 471 *A.*2d 775 (1984) (quoting *Walker* for same proposition). Thus, the Appellate Division observed that regardless of *Carbone*, the sanctions and penalties imposed upon petitioners would remain enforceable. Similarly, petitioners in the case before this Court cannot be the judge of their own case in spite of New Jersey's

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[3] In *Walker v. Alabama*, petitioners Dr. Martin Luther King, Jr., and the Rev. Wyatt Tee Walker, among other ministers, were jailed for violating a constitutionally suspect parade ordinance and injunction as a result of a protest march they led against the strict laws of segregation in the State of Alabama. This Court ruled: "[T]he rule of law that Alabama followed . . . reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion." *Walker v. Alabama, supra*, 388 *U.S.* at 320-321.

solid waste crisis and in spite of petitioners' flagrant violations of the law governing that crisis. As ruled in *Walker v. Alabama, supra*, "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law." *Id.* at 321. Petitioners "with knowledge of the waste flow orders, deliberately ignored those orders and new rate increases." (Pet. App. 87a) As the Appellate Division concluded, petitioners "cannot shield themselves from liability for their deliberately contumacious acts by raising the defense that the flow control orders at issue are unconstitutional under *Carbone*." (Pet. App. 87a) Neither should petitioners now be allowed an opportunity to inappropriately forge the Commerce Clause, nor this Court's decision in *Carbone*, as a sword to obtain an unwarranted preference.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons, their Petition for a Writ of Certiorari should be denied.

Dated this 15th day of March, 1996

Respectfully submitted,

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